

LEGISLATIVE AUDIT ADVISORY COUNCIL

Minutes of Meeting January 26, 2009

A meeting of the Legislative Audit Advisory Council was held on Monday, January 26, 2009, in House Committee Room 3 of the State Capitol Building in Baton Rouge, Louisiana.

CALL TO ORDER AND ROLL CALL

Representative Noble Ellington called the meeting to order at 3:05 p.m. A quorum was present with the following members in attendance:

Members Present

Representative Noble Ellington, Chairman
Representative Charles Kleckley
Representative Anthony Ligi
Representative Cedric Richmond
Senator Ed Murray, Vice Chairman
Senator Nick Gautreaux
Senator Ben Nevers
Senator John Smith

Members Absent

Senator Willie Mount
Representative Neil Abramson

APPROVAL OF MINUTES

Copies of the minutes for the meeting of October 7, 2008, were previously emailed to Council members for review. A motion was made by Senator Nevers that the minutes for October 7, 2008, be approved as read. The motion passed without objection.

EXTENSION REQUEST FOR LOUISIANA DEPARTMENT OF INSURANCE

Steve Theriot, Legislative Auditor, stated that the item on the agenda before the council is the extension request for the Department of Insurance (DOI). He stated he had not heard of a extension request coming from the DOI, but in filings by DOI's legal counsel there contained language that evidenced they must have asked for a request and been denied, which was incorrect. The Department head in previous conversations with the legislative leadership was granted an extension until January 31, 2009. At the 31st, the DOI will not be in compliance with the audit law, so the Marionneaux amendment (Act 771) takes effect. From a standpoint of funding purposes, the statute states that any agency that was not in compliance with the audit law would not receive any funding from HB1 or HB2. A hearing in court will be held tomorrow for an injunction, for a restraining order to implement that part of the law which would prohibit the funding part of that, unless a request for an extension is granted by the committee.

Mr. Theriot stated that he has the authority to give the first extension for any agency, but any additional extensions must come from this body. He said from the copy of what was filed that morning, on page 24 states that despite a request from the DOI for a further extension of that deadline, it has been denied by the auditor's office. Mr. Theriot reiterated that maybe it had been misunderstood but that he only has the ability to provide the initial extension request any additional extension request had to be obtained by Audit Advisory.

Senator Gautreaux asked for an update on the PIAL hearing held October 27, 2008. Jenifer Schaye, General Counsel for the Legislative Auditor, said summary judgments were filed by both parties and denied. It was then certified to the First Circuit with briefs filed on January 16, 2009. Senator Gautreaux asked when to expect some kind of decision. Ms. Schaye said the First Circuit runs about one to one and a half years behind on cases because of their case load and they have not yet given us a hearing date.

Representative Richmond said since the matter has been briefed, they could request an expedited hearing for oral arguments. Ms. Schaye said she would be sure to pass on the request to their Department of Justice representative.

Mr. Theriot said that on a number of occasions meetings were held with the Commissioner to discuss access to records. Statements were made that the LLA had access to a locked safe, however, only DOI personnel had access. Mr. Theriot requested on-sight access to DOI's computer system to review the approximate 13 million emails, which would help complete LLA's audit. However, if pertinent information was noted it would need to be removed so a finding could be written. DOI's attorney said that he would have to talk to the Commissioner. No response has been forthcoming.

Senator Gautreaux asked Mr. Theriot if the emails were protected or secured on a back up server. Mr. Theriot said some emails are deleted prior to being backed up and may be lost. The interesting part is that the DOI has hired an outside vendor who has had access to those records which we have been denied. That individual has been assisting the DOI's staff in ferreting through documents or emails that DOI considers private.

Senator Gautreaux asked how it can be private if on a public system. Mr. Theriot said that is a good question, but as auditors we must have access to records, auditors must be able to see the actual transactions that occur. Senator Gautreaux stated concern that they can delete them, so who is to say they are not going through deleting what they want to delete right now. Mr. Theriot said that is correct. Senator Gautreaux replied there is no injunction stopping them from deleting the emails, but you can at least tell if/when a record was deleted during that period of time, then they would be in violation if you had a court order.

Mr. Theriot said the DOI does have a back up program for their information, but some emails may have been deleted and would not have access to. Mr. Theriot stated the outside vendor expert had given that information.

Senator Gautreaux asked if the LLA had tried to get court order to prevent DOI from deleting emails. Mr. Theriot stated the DOI's retention capability and the possibility that some emails may be lost had recently been made known. Senator Gautreaux asked how can they retain those emails without being automatically deleted. Mr. Theriot said maybe the Commissioner could speak to that better because he did not recall.

Ms. Schaye said that a lawyer for the DOI stated there is a policy whereby the employee decides what is a business record and what is not. So what Mr. Theriot had referenced earlier, if the individual employee made that decision and then deletes that email prior to their backup, taking it off that day, then it will not be available when they do their ordinary backup.

Senator Gautreaux asked how long have they been fighting. Mr. Theriot said about 1½ years. Senator Gautreaux said then go 1½ years back to decide what is business and what is not. Ms. Schaye stated that is an ongoing basis, so there could already be deletions that would raise the whole issue of completeness.

Senator Gautreaux said his understanding is that deleted items are really never deleted. Ms. Schaye said confirmed the LLA has such a program that can retrieve deleted information. Senator Gautreaux asked what does the law require?

Ms. Schaye said the retention policy is set by legislature. It says that public records, even if not considered to be viewable by the public, are to be kept for 3 years except if the law says there is to be a longer retention period. There are also some rules that the Secretary of State has made that says that every public employee is to be advised that these are to be public records with no expectation of privacy.

Representative Kleckley asked why the auditor needed access to the emails Mr. Theriot said as we began our audit and looking over Citizens Insurance, we became aware of communications between both members of the board of Citizens and employees of PIAL who were communicating with employees of DOI because Citizens prior to just recently had no employees and did not have the capacity to deal with the number of particular issues with the operation of Citizens. The chairman of the board of Citizens at that time was an employee of DOI, who in turn had communication both with Mr. Lisotta, who at that time ran Citizens for PIAL and members of the board. Some of these emails that were going back and forth were very questionable in terms of what was being discussed, such as individuals asking on the rate setting part of Citizens because the DOI used his actuaries and acknowledging the fact that the major insurance carriers would not respond to an outside agency other than DOI's regulator when asking to get information on the market survey as an example which was needed to set rates at Citizens. So the DOI's actuary and whomever else put together this model that they sent around the state to get those requests to comply with the law. As these emails were coming back and forth there was some discussion about how do we set this rate, do we set the rate lower here so we can get more policies for this particular insurer. Now whether or not in

the end any of that actually took place or the trigger was pulled, we do not know because of not being able to have complete access to everything, it is impossible to determine.

Representative Kleckley asked Mr. Theriot if he was just inquiring or wanting to know if the trigger was pulled. Mr. Theriot said any auditor will access risk just like an insurer will when it goes to insure in a particular area, determine the risk of a material misstatement. Obviously if Citizens rates are not set properly then every other policy holder in this state becomes subject to potential surcharge to make up the difference. There also were some allegations in looking at it that there are about 10 factors that are normally considered in structuring this policy. They did not use all of those factors in structuring it out and when they got the information in, they cut off the top rate of all of them. They claim that there were some outliers, but were there really outliers out there -which potentially there could have been. Representative Kleckley requested an explanation on qualifying outliers. Mr. Theriot provided a partial explanation and stated he was not sure how they qualified but it appears that if the rate in one parish was \$1,000 and a neighboring parish rate was \$600, there were some inequities that they could not explain so they wanted to throw out the outlier. Basically they were potentially using flawed information to calculate the actuarial rate. That is where our concern is because it has a major bearing not only on policy holders but also on bond holders. Also, if in fact Citizens becomes competitive in the marketplace, how many policyholders should not have been there which potentially could have a claim that everyone has to bear the burden of.

Representative Kleckley asked Mr. Theriot if he had ever suggested, or anyone in his office ever suggested to the DOI that they wanted their personal emails off their personal computers maybe from their home? Mr. Theriot said not to his knowledge, the only question they asked the DOI was if the *Blackberries* that individuals were using for business purposes were in the state system then that was fine, but if they were not, obviously that was something necessary to see.

Representative Kleckley asked Mr. Theriot if the LLA had ever requested any personal computer from DOI employees' homes or their personal accounts. Mr. Theriot replied that the only account that came into question was from an outside agent who reported there was an outside system being used by the department. In discussions with the Commissioner he said it was his campaign account, although it was not identified as his campaign account that he was communicating with. It seemed like official business to this individual because it was just stipulated Commissioner of Insurance Jim Donelon, and did not state the Campaign Committee for Insurance Commissioner. Although the Commissioner said it was from his campaign account that was the only outside source or allegation that we had from an outside entity that something other than a public computer was being used.

Mr. Theriot further clarified that the issue is about approximately 13 million emails. This is not an observance of each and every email, this is about identifying attributes and auditing smartly so that as we put the attributes in the system those emails containing those attributes will fall out, then we look at those closely. In no way are we concerned about someone's personal life. This is about looking at emails that went across that contain spreadsheets, financial information for the most part, and dealing with the issue of rate setting and how people were getting contracts. Any proprietary contract with an outside insurer we are not allowed to see, that is off limits.

Representative Richmond said what you just said raised some eyebrows. If a regular citizen just sent in a public records request to the DOI asking to see the emails on state issued computers on the state server - besides trade secret, proprietary information - what else bars a public citizen from being able to see any of that information you talked about. Mr. Theriot said he did not think anything. Representative Richmond said the scope is beyond trade secrets, but the fact is that you just do not know what is on the emails that they do not give to you. Mr. Theriot said not being able to see it, obviously he cannot opine upon something he does not know, so therefore - and not suggesting that anything is awry, but like anything else, until you get to see it, you do not know.

Representative Richmond said that transparency has been a big issue for this new administration. His question was that besides trade secret or privileged information was there any other reason that the Insurance Commissioner cited to you for a specific email or group of emails why you cannot look at those. Mr. Theriot said that Commissioner Donelon cited deliberative process between himself and his attorneys, or his staff and his attorneys, HIPAA consideration for individuals and personal information that people may have, as well as proprietary information.

Representative Richmond said getting away from the proprietary information, HIPAA will cover all your health issues. Besides those technical areas - maybe I should just ask the Commissioner, even if for personal information, what statute, what law, what legal basis do we have for not turning those over, besides the fact that it may get a little uncomfortable.

Mr. Theriot said that for approximately 1½ to 2 years prior to their audit Mr. Donelon's attorney at the time, assigned to him from the Attorney General's office, sent a memo to all the employees of DOI citing that there should be no expectation of privacy for any emails on the state computer. Senator Murray confirmed his belief that the auditor has authority to review all DOI documents and that the private contractor was allowed to view what the auditor could not see baffled him.

Mr. Theriot stated the contractor is assisting in putting together the documents or reviewing the documents, extracting, and redacting documents. Mr. Theriot requested of DOI's attorney if the contractor had a background check done. Mr. Theriot then commented on the fact that the contractor did not have the statute protection the auditor has.

Senator Murray asked who has the contract and what kind of firm is it. Mr. Theriot said it was R.J. Mayer & Associates, located in Baton Rouge and as far as he knows it is IT consultants. Senator Murray asked the value of the contract. Mr. Theriot said it is around \$28,000/month. Senator Murray asked the length of time on the contract. Dan Daigle, Director of Compliance for the LLA, said they had not done a great deal of work in this area, but sometime in the middle of 2005 they (R.J. Mayer) began working for the DOI, and was not sure to what extent they are getting paid to do. Senator Murray asked what the spending was to which Mr. Daigle replied we think it varies but we have not done a great deal of work in this area. Senator Murray asked Mr. Theriot if he thinks that entity is being allowed to review the information that he has been prevented from reviewing. Mr. Theriot said he did not know.

Senator Murray asked if Mr. Theriot knew the individual's name actually doing the work for R.J. Mayer and Associates because they might want to have him come before the council. Mr. Daigle said Robert E. Wise is the person doing the work. Senator Murray asked if they have reviewed the contract. Mr. Daigle said no.

Senator Murray asked about the court hearing. Wade Shows, attorney for LLA, stated that the hearing is on the preliminary injunction that is limited strictly to whether an injunction ought to be issued against Mr. Kennedy's office, the Treasurer's Office, and against the Division of Administration (DOA) to keep them from exercising what the law mandates in terms of failure to comply with the audit law. There is no injunctive relief that is being requested at this point against the LLA.

Senator Murray restated that the court tomorrow is being asked to enjoin any decision that this counsel makes if we decide that the DOI is not in compliance with the audit law therefore cannot receive state funds. Ms. Schaye, said they are not enjoining this counsel and confirmed Senator Murray's understanding of the DOI's intent to enjoin the Treasurer and the DOA from following the legislative will. Mr. Shows stated assuming success on the preliminary injunction.

Senator Murray asked if this has been briefed from both sides - the legislature has filed a brief, has the governor's office, and also has the treasurer filed a brief? Mr. Shows said yes, it has been briefed, and they are actually filing some exceptions this afternoon to the request relief. Senator Murray asked Glenn Koepp and Butch Speer to come to the table, to explain the consequences if the court rules tomorrow to enjoin whatever action this counsel may take today. If the court decides to go forward that would essentially tell every other state department or anyone that gets money that they do not have to comply with the law as well.

Butch Speer, Clerk of the House of Representatives, said the consequences certainly send a message to the rest of the state departments and he believes the DOI has made it clear that they believe they are representing other state agencies in this issue. If the court enjoins or stops the Division of Administration from complying with the law, which means they will continue to pay, and there will be no consequence with regard to failure of the Commissioner of Insurance and the DOI for not providing that information to the auditor. Mr. Speer confirmed to Senator Murray that no other entities have filed an *amicus* saying that they share the Insurance Department's opinion.

Representative Karen Carter Peterson after confirming with Mr. Theriot on LLA engagements with CPA firms and how the firms operate under the same contract law applied to the LLA what is the difference between the Department of Revenue or Department of Environmental Quality and the DOI? Representative Peterson noted Mr. Donelon shaking his head no. So why do they comply and the DOI does not?

Mr. Theriot said we audit DHH and DSS, which obviously under HIPAA have exposure. We also audit Department of Revenue but DOI is the only one so far where we have had the issue. We have had isolated differences in some of these departments but in the end we have worked those out and they allow us to do our work. He said the process is not perfect, but we

have never had an agency bow up and not allow us to have access. Representative Peterson asked for the top three reasons why the DOI and the Commissioner is saying you should not have access to it. Mr. Theriot said one is confidentiality with the proprietary information, the other is HIPAA, and the other is personal emails. Representative Peterson asked what he meant by personal emails, because they are still on the public computer. She told Mr. Theriot she only asked what the arguments were, she did not ask him to defend them.

Mr. Theriot said during the course of session last year he even asked if Mr. Donelon was concerned about exposure to litigation, that he would along with him try to add to the statutes something that would hold him harmless regarding personal emails. Mr. Donelon respectfully declined saying that even if something were passed he could not abide by that because this was a federal issue he was concerned about, not a state issue. We have tried any and every avenue that we could think of to get past this.

Representative Peterson said confidentiality applies to the state auditor as a reason to prohibit transmission of this information but it does not apply to a paid \$ 28,000 per month contractor. Mr. Theriot said that was his question. Representative Peterson asked where was written an exception to the confidentiality rule. Mr. Theriot said he was not sure, he had not seen it. Representative Peterson said maybe Mr. Donelon can share that when he comes up.

Senator Gautreaux asked if Mr. Theriot has access to the contract with R.J. Mayer and if the Commissioner would give him a copy. Mr. Theriot said they do not have the contract and said in all fairness had not asked for the contract and not sure if would have access. Senator Gautreaux said that Mr. Donelon shook his head yes. Senator Gautreaux said he was interested to see what their requirements were and if parameters set by their lawyers to exclude certain things, or if it was a general contract to do work for the department.

Mr. Theriot said he is not insinuating that whatever contract with an outside agency or vendor may not have some protection clauses in that contract. His suggestion is that the contract cannot be any more compelling than statute in terms of what it provides his office for viewing information. Senator Gautreaux said in the court case tomorrow were it to be decided in the favor of the Insurance Department, then Councils on Aging, who are quasi government entities which receive public funds, and all these other ones that receive public funds will realize the implications.

Mr. Theriot said that he has shared this with the Commissioner before: if the courts rule that we do not have access to all records at all of these agencies, not only his, but those of which this argument is purporting to represent, then my office will have a scope limitation on being able to audit and will not allow us to express an opinion on the financial statements of any agency that does not allow us to have access to records. What that means in the end, is that the state's CAFR not only will have a qualification, but because of the materiality may not be able to express an opinion on it period, which in essence will harm the credit worthiness of the state in terms of the bond holders. Not only from state agencies, but every local government who issues debt or any local agencies who issues debt which bears the name of Louisiana will bear the brunt of that in some fashion. He said he does not know to what degree, but it would not be positive. As he had said all along for a year and a half prior to issuing the CAFR - the qualification on the CAFR, and those implications to the CAFR - he was not sure how dramatic it would be until we got to the end, but he knew it would not be positive.

Senator Gautreaux said his biggest issue is about the reforming Louisiana and about transparency which has been spoken in every election there was. Every elected official talked about it, and now we are looking at - is there really transparency in the government or not? His other question was if the DOA and the Governor's office each filed their own brief and also did the Treasurer file their own. Ms. Schaye said that the Treasurer filed his own brief, and Treasurer's counsel is present. Senator Gautreaux asked was his brief in support of the law, in support of what they were doing.

Jim Napper, Executive Counsel of the State Treasurer, said they have filed a response to the request for a preliminary injunction and unless they are enjoined, it is the Treasurer's decision to follow the statute. Senator Gautreaux asked what their response was. Mr. Napper said their response was that it was premature because DOI could have asked the council for an extension and if the extension were granted, there is no harm to them during the extension period. An extension was granted making December through the end of this month, and like Mr. Theriot, we have received a pleading this morning that said they wanted another extension. We had not been involved in the request for the extensions and so forth.

Senator Gautreaux asked if anyone were present from the Division or the Governor's office. No one came forth. Senator Gautreaux said that he would like to know where the Governor's office stood and what they actually said in their response to the brief. Mr. Napper

said he has not seen any response. Senator Gautreaux asked if our attorney has seen any response. Ms. Schaye said that they have not filed so far as we have seen. Senator Gautreaux remarked that transparency and following the rules are in high regard with the Governor. Mr. Napper said technically the Governor is not a party to this, just the Division of Administration.

Senator Murray asked Mr. Theriot if the Insurance Department also made a request this morning for another extension. Mr. Theriot said that it came to him in the form of the pleadings that Mr. Donelon's attorney filed in the court that morning. In those pleadings they claim that they had asked, and he read from the pleading "thereafter an extension was granted by the Legislative Auditor through January 31st, 2009, and despite request from the Louisiana Department of Insurance a further extension of that deadline has been denied by the Legislative Auditor". Mr. Theriot reiterated that he had not been approached for an extension beyond the January 31st date, but even so, he is only allowed to do the first extension, and this committee has to give the second extension.

Senator Murray asked Mr. Theriot if he had been asked for another extension other than in the pleading that was before him. Mr. Theriot said that he was not aware of them asking him for an extension. Senator Murray said to keep it clear for the audit council's perspective, assuming he had been asked, what would have been his recommendation to this council about another extension. Mr. Theriot stated that he never wants to deny anyone an opportunity to conform with the audit law if in fact they are willing to earnestly work toward allowing us to have compliance with the audit law, then he is willing to grant an extension, or at least recommend the granting of extension, but short of that. Senator Murray asked for clarification if turning over or making all this information available to him and his office for review was what he meant by willing to cooperate.

Mr. Theriot said as he was told by Mr. Donelon's lawyer the last time they met that he would confer with his client and get back with him, which he never has. The major concern appeared to be that the Commissioner did not want us to take off campus any information that we had encrypted, so we have asked to get into DOI's system, since it has been a year since we had burned these CDs and we have lost custody of those CDs, so we do not know what all has been done since people have been looking at them, both his lawyers and contract employees. Mr. Theriot said if DOI would allow access to those computers, let us do our audit from the computers from what he has, and if in fact we uncover or find information or emails or data that we might need to write a finding, we will need to be able to print that because we cannot write the finding without proof. This is basically the sampling technique that is done, it may be done a little bit different because the area of risk is greater here because of what we already know.

Senator Murray asked if any private insurance company or adjuster or anyone that the department regulates has contacted your office to say that they do not think you should see the documents. Mr. Theriot said not a one. Representative Richmond asked Mr. Theriot what this is costing the taxpayers, how much have you spent to gain access to these records, if you had to quantify an amount. Mr. Theriot said that between the extra man hours it is significant, within medium to high six figures.

Representative Ellington asked Commissioner Donelon to come to the table.

Commissioner Donelon said he appreciated greatly the opportunity to correct much of the misinformation that you were just given. He began by asking the council to take a quick look at the consent agreement entered into a year ago between himself and the Legislative Auditor that would have resolved all issues brought to you here today. To address the last question about how much all of this is costing, it is costing the insurance industry through the payment of fees passed on to policy holders statewide whatever bill the Legislative Auditor sends to us at the conclusion for all of his expenses including his outside counsel, including his inside counsel, including all of his auditors. We get that bill and we have to pay it out of our budget, all of which budget is paid by fees from the insurance industry, all passed on in the way of admissible reimbursement in rates paid by policyholders statewide.

Commissioner Donelon said we would not be here today but for me, probably it would have hit the fan by now and you would have demanded that this happen. He said that he fired Terry Lisotta because he could not do the job of running Citizens, and was in over his head with Citizens in disarray, in meltdown, the phones were not being answered, the policies were not being issued, the claims were not being paid. He said because of that incompetence in late 2006, he called the board in and said we have to do something. Mr. Donelon said that after a nationwide search he hired new management who has created a professional, honest, transparent, efficient operation with 125,000 policies issued out of Metairie and Baton Rouge offices. He continued that approximately 90 days after firing Mr. Lisotta, his 10 year secretary in Metairie brought in a permafile box of records she had kept at her house documenting 10

years worth of expense account abuse by Mr. Lisotta. He called the Legislative Auditor's office, the District Attorney's office, and the Attorney General's office and told them that a criminal investigation and a compliance and/or financial audit needed to be done. That has resulted in full cooperation by our office with the FBI first, the U.S. Attorney second, the criminal division of the Attorney General's office third, giving unfettered access to every document that they were interested in, resulting in a 15 count indictment being handed down against Mr. Lisotta.

Commissioner Donelon said he then entered into the consent agreement which is before the council because the first thing the Legislative Auditor wanted to do, is the same thing his predecessor wanted to do in 2004. He stated that it is not true that this has never been raised before, that they are the first agency to do this. His chief deputy's father had an attempt like this on his school board that he was serving as a member of in St. Helena Parish and refused to give documents. The Legislative Auditor tried this in 2004 with *Dan Kyle v. Public Service Commission* in the First Circuit Court of Appeals which he had the decision right there, and offered to make copies available to the council. He stated that it clearly and definitively shows that attorney client privilege and deliberative process privilege, two of the privileges he had asserted in this effort to get unfettered access to 14 million emails in and out and within his department were protected and the Legislative Auditor is not an investigative body. Mr. Donelon said that if the Inspector General or Attorney General wanted records, they could get them. Also when the FBI and the US Attorney wanted them, he said come get them. Mr. Donelon further explained the Legislative Auditor is not covered by the law that protects attorney client and deliberative process, executive privilege. He stated that he has waived all his attorney client privilege. But separately in the United States Constitution and the State Constitution privacy is protected including government owned computers, as well as government owned telephones. Mr. Donelon explained if calling long distance from your desk in the legislature or from my office in the Department of Insurance, that is public money being spent and they have a right to that. But no public money used if receive and send personal emails, as long as not interfering with your job duties. He said that is permitted by Civil Service Rules, by United States Constitution, by all case law uninterrupted as spelled out in the memorandum that was filed in the 19th Judicial Court that morning on his behalf. He further explained that it is allowed and it is protected and if he deviates from that and waives that protection then he has personal liability for damages that individual state employees would assert and be entitled to compensation for. He said that they cannot reimburse him for it, even if they pass a bill saying they can. He stated that the reasoning behind that is to force public officials to not give up personal information that they may have in their possession.

Commissioner Donelon continued saying that the Legislative Auditor had told his in house lawyers first in August when he was threatened with the cut off of funds to his agency and he hired in his opinion the most reputable, competent attorney in the city of Baton Rouge, David Rubin. He said that he hired Mr. Rubin because it got real serious when they were threatening to shut him down, a state agency, if he did not capitulate to this demand that violates the opinion rendered in the courthouse three stories above where they are housed, in which they told my in house lawyers and told Mr. Rubin they do not recognize and do not acknowledge and do not abide by. He said that they choose to ignore it, but I do not have that luxury. Mr. Donelon said that if he chooses to ignore it, he would do so at the risk of Mr. and Mrs. James J. Donelon's checking account. He said that he is personally liable for release of personal emails, according to the law as explained by Mr. Ward, and by my Assistant Attorney General that filed the first lawsuit that resulted in the compromise that the council sees in front of you, and now by Mr. Rubin.

Mr. Donelon said since the conference call with Mr. Speer, Mr. Koepp, with Senator Chaisson, with Speaker Tucker and the Legislative Auditor at 10:00 a.m. the morning after Christmas, he would be happy to reenter into that agreement and what it says is we will review the 14 million emails that we retrieved at department expense. He added that the emails had already been deleted in accordance with state procedures and laws for the destruction of documents and emails. But they were retrieved at his department's expense. He said he would be happy to make available all but 2,000 of those emails because they have looked at all 14 million and identified 2,000 that are personal emails, attorney client privilege protected, or deliberative process protected. Mr. Donelon said he would drop the proprietary on behalf of the companies because they are on their own. He had sent out a blast email and told them their information was at risk - it was being asked for by the Legislative Auditor, protect yourself if you choose to or not. Mr. Donelon said he is no longer asserting that, but he is asserting personal emails, deliberative process and attorney client.

Mr. Donelon stated that he would read from the conclusion of the memorandum that Mr. Rubin filed that morning in the 19th Judicial District Court. He read, "The issues are significant, if no privileges can be asserted by agencies subject to audit then the Legislative Auditor is free to use the "unfettered access" he seeks to, for instance, to look at personal medical records of patients within the records of the Department of Health and Hospitals. He could access highly sensitive and confidential business plans submitted to the Department of Economic

Development by businesses seeking to locate in Louisiana. He could access the email systems of the Office of the Governor and his legal counsel. He could access confidential appraisals by the Department of Transportation and Development of property to be expropriated. He could access confidential reserve and drilling information of the Mineral Board. He could access communications between the attorney for a city or a parish and any other auditee including confidential advice given to municipal elected officials."

Mr. Donelon said that is a short list of what is at issue here. He admitted that he stood corrected that morning that it would not include his tax return. He said but those millions, or hundreds of thousands, who do online filing in Louisiana are subject, and he found out that the legislature passed a specific provision in the audit law to allow those tax returns to be accessed by the Legislative Auditor. But in your abundance of caution you added "any person divulging such information contrary to the provisions of R.S. 47:1508 (the legislative audit confidentiality statute) shall be punished by imprisonment for not more than 2 years or fined for not more than \$ 10,000 or both". He commented that it is a serious felony if violated, but no such protection applies to personal emails, attorney client privilege, or deliberative process.

Mr. Donelon explained that for the campaign issue, he did what his opponent did - bought a list of email addresses, publicly available of agents statewide. He said he did not know the name of the company that he had hired, but they weekly sent out emails to insurance agents statewide, trumpeting in the case of the one that was turned in to the Legislative Auditor his fight with All State over their effort to illegally not renew 30,000 policy holders in south Louisiana. He said at the bottom of the emails it did not evidence that it was from my campaign, it only stated not paid for with public funds. That is the disclaimer that the political consultant somewhere in America uses on such email communications that he does for his clients. Mr. Donelon said the same day he was also made aware of a threat on the life of one of my department employees. He found out about it because a couple of legislative auditors came over to their office and were asking if the emails sent in his name to insurance agents about his fight with All State were paid with public funds. Mr. Donelon said the answer was of course not, let us look into this and we will give you an answer. He said then the auditors stated that they had information that one of his employees was sexually harassing an agent whose husband caught the emails and was now threatening the life of one of his employees. Mr. Donelon said they need to know more about this because just as they did with state police for over a year, they want to cooperate in catching such a dastardly deed if it is going on and they want to protect all of their employees if there is angry citizen out there that wants to shoot somebody in their building. Mr. Donelon said the auditors instead said they wanted copies of all DOI emails, incoming and outgoing, because they are going to investigate. They don't have that responsibility or right, it belongs to the state police and we asked them to do that, and they did when we raised that issue.

Mr. Donelon said the Legislative Auditor has outside contracts too. He said that the person Mr. Theriot referred to, Mayer or Meyer, whatever the name is, works full time in our building, goes to work every morning, goes home every night from our building. Mr. Donelon said but he is an in house contract, not a civil service employee. Mr. Donelon said copies of all their contracts are in the filing cabinet and all of their contracts are public record. He said that all the auditor has to do is ask one of our civil servants to get them a contract with Mr. Rubin, or Mr. Mayer, or whoever and it will be immediately presented. Contracts are public record and anyone who came to ask for it would be given it instantly. Mr. Donelon said that is what Jenny Benoit, the lawyer who was accused of unprofessional activity on their behalf in this process, to get off of representing them because her title on pleadings resulted in that compromise said the Attorney General. That threat was made a year ago and she backed off but took serious exception to the further allegation made in committee that she acted without the authority of her supervisors, and her supervisor quickly clarified that and dispelled that as a non truth.

Mr. Donelon said tomorrow morning we resolve this and stated that he did not ask for an extension in the pleading entered that morning. He said that the pleading recited a meeting between his attorneys and the Legislative Auditor's staff of 18 that they met with including Mr. Ward and his other attorney, Mr. Rubin and maybe Ms. Bowler three weeks ago. Mr. Donelon said that Mr. Rubin had not put his memorandum together yet and he said "can we get an extension". He said that if he had known, he would have said "not" because he was asked to request on December 26th and at that time when he did ask for it, at the request of the people on that morning after Christmas conference call, he told them that the hearing was set in time before the next time his funds could get cut off. Mr. Donelon said the hearing will be held before that cutoff date. He said if he agreed to ask for this extension he assumed that he would be continued in the right to have a hearing before Judge Hernandez before my funds are cut off again. Mr. Donelon said he was told by Mr. Speer and the Speaker and the President of the Senate and Mr. Koepp, no question about it, we do not play games like that, you will be allowed your opportunity to have your day in court, as we are set to have tomorrow morning at 9:00 a.m.

Mr. Donelan said if the Legislative Auditor wants to go back and reenter into that consent agreement, he is ready to do so. He said that the 14 million emails have been perused and 2,000 have been determined by his lawyers and staff - a committee of them working on them in shifts - to contain personal email information or attorney client or executive privilege. Mr. Donelan said if those are requested by the Legislative Auditor they will be taken in camera, meaning taken by the judge in his chambers and he looks at them and decides if they are relevant to not an investigative audit, because the Legislative Auditor does not have that power, but whether it is relevant to a financial audit. He added that every check, every spreadsheet, every checking account, every financial document has been made available to Mr. Theriot's staff. He said same as the time before, when Mr. Theriot gave us a 100% clean audit the year before all this broke. Mr. Donelan said he would abide by in camera review for determination of any such privileges that are at issue and allow the judge to make that determination. He said as his memo states he is doing this not only on his behalf, but also on behalf of all of the executive branch, all of the executive agencies, whether it is the Department of Natural Resources, or the Secretary of State's office, or the Governor's office. These issues need to be resolved, *Kyle* is the law of the First Circuit of the State of Louisiana, and Supreme Court that sits above them has not reviewed that decision. He said it is the law of Louisiana and it is applicable to the Legislative Auditor and to every agency such as himself being subjected to such an audit.

Mr. Donelan clarified that they reviewed many thousands but not all 14 million emails. He finalized that he covered all of the points that he wanted to make and appreciated the council's indulgence in letting him have this time to address the issues that were presented, and welcomed the opportunity to answer any questions.

Senator Murray asked the Commissioner if he were asking for an extension from the Council today. Commissioner Donelan said no, sir. Senator Murray said in the memo filed on your behalf you cited several examples that your lawyer Mr. Rubin said that some harm could be done if the auditor could go into all areas, such as leases and patients records. Senator Murray asked if he knew the auditor to have tried to do those things before. Commissioner Donelan said not those things, but the exact same issues were raised in *Kyle vs. Public Service Commission* in 2004. Senator Murray said he understood, but he is asking in the memo. Commissioner Donelan said not to his knowledge has he done it in any of those other areas yet.

Senator Murray asked Mr. Donelan if he was relying on attorney client privilege and deliberative process to withhold this information and not make available to the auditor. Commissioner Donelan said he has waived all of his attorney client privilege, but asserts *Kyle v. Public Service Commission* as the law of the land that includes attorney client, but the client can waive attorney client anytime they choose. Mr. Donelan said he did not know what the Public Service Commission did but suspects that they did not waive it. He reiterated that he has agreed to waive his attorney client privilege.

Senator Murray said he thought there were two things relying on. Commissioner Donelan said three: personal emails, attorney client, deliberative process as well as HIPAA, and he added fraud investigations. Senator Murray said on the attorney client that you are not relying on it, you have waived that. Commissioner Donelan said he is relying on attorney client, for the purpose of getting a final decision from the courts as to what is protected and what is not, but he is willing to waive his attorney client privilege. Senator Murray asked Mr. Donelan if the attorney client privilege that you are relying on in the *Kyle* decision - you are the client, and what you have said to your attorney, you are saying should be protected. Commissioner Donelan said under the law. Senator Murray pointed out that the auditor requested these things before you had counsel on this matter.

Commissioner Donelan said no, unless you do not consider his in house counsel as counsel. Frankly the first volley of things requested and made available, they did not even call him at the campaign headquarters and tell him about it, they just gave them - Chad Brown's emails, Robert Wooley's emails, Lauren Teague, my secretary and Wooley's secretary and Chris Faser's emails were just given and then the next day the request went to 'we want all emails' and he was told by the Attorney General assigned to his office, Ms. Benoit, charged with all things public record, that he could not do it.

Senator Murray said so you are referring to Mr. Rubin, you are saying that the attorney client privilege waived is with Ms. Benoit and your in house counsel. Commissioner Donelan said initially yes, but now also Rubin's emails, because he has nothing to hide. Senator Murray said the auditor wants the emails that were in your department from before Rubin became counsel. Senator Murray asked is your in house counsel open. Commissioner Donelan said that they recreated three years worth of electronic transmissions that included attorney client communication on a myriad of issues including All State. He feels entitled to attorney client

privilege under *Kyle vs. PSC* on those emails. Mr. Donelon said he will not assert it, he will waive it.

Senator Murray said the brief filed on your behalf in the petition includes it, but you are saying that you will waive it; however, before the court you do not waive it. Mr. Donelon said that is correct for that one of the 5 or 6 areas of issue. Senator Murray said in your remarks you referred to the auditor's contracts and those costs he incurred that will eventually be passed onto you which will be paid by the people insured in the state. At some point you expect the auditor will send a bill to the Department for outside counsel. Mr. Donelon said they always do. Senator Murray said the same is true about the outside contracts that your department has, they also get paid by the insured. Mr. Donelon said sure, yes sir.

Senator Murray quoted the auditor as saying R.J. Mayer's contract to cost around \$ 28,000 per month and asked Mr. Donelon if that was accurate. Mr. Donelon said he had asked Ms. Bowler when Mr. Theriot was testifying and she said yes, for a plethora of people and services. Senator Murray asked if it would be more cost effective to have regular state employees doing the work. Mr. Donelon said it is a question that he has asked as well, and he has been told no, and also told that they had a volley of applicants for the last RFP's that they did on IT. Mr. Donelon added that this has been going on for a decade or more, half in house or part in house, but mostly contract. He said it is a relevant question for all of state government for your budget consideration. He said he thinks the problem, just like the problem he had with getting actuaries because he pays his chief actuary over \$ 200,000 a year and the Legislative Auditor has been trying to hire one for years now and cannot get one. Citizens just got one and he thinks that he was the only applicant they had at state salary structure. He commented that IT is similar.

Referring to the contract with R.J. Mayer & Associates, Senator Murray asked if they are actually reviewing the information that he does not allow the auditor to review. Mr. Donelon said no sir, absolutely not, but they could, just as other employees could. Mr. Donelon stated that he is not at liberty to tell about a serious issue with one of his civil service employees on that very issue, about an employee in the IT division going beyond their need to know and their right to access information. He added that Mayer & Associates recovers data.

Senator Murray asked if the contractor is able to review some of the information that the auditor is not being allowed to review. Mr. Donelon said he does not know the exact answer, but his understanding is they have access to what they need in order to do their part of the IT function, and only what they need, not everything. Senator Murray asked if R.J. Mayer is able to access data. Mr. Donelon said R.J. Mayer is our employee. Senator Murray asked if they are allowed to review anything they need to do their function, why not allow the auditor likewise. Mr. Donelon said *Kyle vs. Public Service Commission* is the law of Louisiana.

Senator Murray asked how much has Mr. Rubin been paid to date. Mr. Donelon said he has no idea, and does not even know what his hourly rate is, but he assumes it is within the attorney general guidelines for compensation and he assumes that is about half of his normal hourly rate. Senator Murray asked if he could get that information to them. Mr. Donelon responded that he would.

Senator Murray said in Mr. Donelon's opening remarks he stated that he would turn over any documents that the Inspector General or the Attorney General asked for. Mr. Donelon responded that he already did. Senator Murray asked if the Inspector General had the records. Mr. Donelon responded that the Inspector General did not ask for it. However, the Attorney General called him over three months prior and said they were opening a criminal investigation on Citizens, and so they put IT people with the AG employees and helped them look at everything in the department because *Kyle vs. PSC* says that that is the function of the executive branch.

Senator Murray said to be clear, the things the auditor wants to see, you are saying the Attorney General has that information. Mr. Donelon said absolutely, they reviewed it in the DOI office and indicted Terry Lisotta, and thanked them for their full cooperation. Senator Murray asked if the Inspector General were to ask for it. Mr. Donelon said they would get the same information because of the sentence in the decision that says they are entitled to it. Senator Murray said so if the Auditor sent to the Inspector General or the Attorney General the items that he wants to review, you would give that information to those two offices. Commissioner Donelon said yes sir, as executive branch offices.

Senator Murray asked Mr. Donelon if he thinks that the legislature does not have investigative authority. Commissioner Donelon said they do not have the investigative authority. Mr. Donelon continued to express what a horrible experience this has been for him and that this is the last place he wants to be and he is gaining nothing. He said that he does carry this as a burden for state government and has been told by his attorneys that everywhere

they go they are told at meetings of in house counsel how appreciative they are for our taking this beating on their behalf. Mr. Donelon said he has been told to do something under duress, but also told by others he is not allowed to do that under the law. He further stated that he thinks the right thing to have done was to go hand in hand a year ago with a joint petition for declaratory judgment, the Legislative Auditor and the Insurance Commissioner to resolve these issues that they choose to ignore raised by the constitution, federal and state, and *Kyle vs. Public Service Commission*.

Senator Murray asked if we pass a statute, and most of us think the law is clear already, but from your perspective, if we passed a statute that said the Auditor has the authority to get these documents would that resolve it for you. Mr. Donelon said he thinks that statute has already been passed, and he acknowledges that. Senator Murray said but you think it is unconstitutional.

Commissioner Donelon said he thinks it conflicts with other laws that you cannot repeal, that constitutional separation of powers issues that prohibit the Legislative Auditor from conducting investigative audits and privacy provisions in the state and federal constitution. He said that he does not think you can legislatively overturn those two limitations. Senator Murray said but you think those limitations do not apply to the executive branch. Commissioner Donelon said that is correct, that is what *Kyle* says, and the reason it says that is because historically and spelled out in the definition of legislative powers and executive powers is the law enforcement function.

Senator Murray said he was speaking for myself, he does not think that investigation and legislative audit means law enforcement. He knows that the auditor has done investigative audits many times. Commissioner Donelon said he knows, and the first day they asked for all of those emails, he said give them. However, the first time Jenny Benoit brought him *Kyle vs. PSC* and said they do not have the right to it because it is based on investigative power or not, he said that was not his fight. But Jenny told him that if he gave up those personal emails knowing *Kyle vs. PSC*, whether he knew it or not, it is illegal and he would be personally exposed.

Senator Murray asked if there is a statute that you could tell us that you think holds you personally liable. Commissioner Donelon said he did not have that in sight, and understood that actually from his brother who told him, who does employment law. Senator Murray said he would be happy to know that statute and asked Mr. Donelon to get it for the council.

Mr. Donelon said he would like to know that too, and he would try to get that for you if that is possible. He continued that the theory would be to chill public officials from revealing this personal information, and they are not talking about emails between boyfriend and girlfriends, they are talking about that HIPAA information. Senator Murray said he understood, but other people in your office are contractors who view that information. Commissioner Donelon said they have to take it down. Senator Murray said there is a confidentiality aspect to the auditor's office that they cannot just go out and pass it on to other third parties as well. Commissioner Donelon said he agrees, and in the case of when they get our tax returns they made it a serious felony and there was a reason why they did that because there was concern about that being not adequately covered by the confidentiality statute.

Senator Murray said you think that there are not any provisions similar to that in violation of any other type of confidentiality. Commissioner Donelon said he knows there are not because that law spells it out in there as an extra penalty in that case. Senator Murray said the last thing he wanted to say was he thought that the auditor's report that came out about Citizens with respect to improper spending and all kinds of things brought the Lisotta and Citizens issue to light. He asked Mr. Donelon if he was stating that he gave that information to the auditor's office.

Commissioner Donelon said absolutely, Ms. Fuselier, Mr. Lisotta's former secretary brought it to him with her two kids at 4:00 pm on a Friday afternoon in his office a year and two months ago and he handed it over to PIAL's lawyers who were there beginning the process of separating out PIAL and Citizens. Senator Murray asked Mr. Donelon again that he was not asking for an extension today. Commissioner said that is correct, he does not want to be back again next month.

Representative Ligi said he received a copy of the memorandum that Mr. Donelon filed that morning and when he saw the *Kyle* case sighted he pulled it up immediately, and needs to reconcile something. The very first sentence in the case in the facts and procedural history states in May 2002 the Legislative Auditor began conducting a performance audit. His understanding is that Mr. Theriot is conducting a financial audit on DOI.

Commissioner Donelon said that depends, if you read my memorandum filed at the 19th, you will see recited sometimes he calls it a financial audit, sometimes he calls it a compliance audit and sometimes he goes back and says financial audit. The only word he carefully never uses is an investigative audit. But a duck is a duck regardless of what you call it.

Representative Ligi said there was a reference to an email that was sent out concerning the confidentiality of people using email for private purposes.

Commissioner Donelon said from his understanding Ms. Jenny Benoit sent out an email and they assume it would be typical for her to do that in her ongoing effort with their 300 employees to keep them between the ditches in doing what they can and cannot do, and that is out of an abundance of caution saying you are not to use this email system for personal use. Mr. Donelon said Civil Service Rules, as well as a volley of case law says that it is allowed as long as it does not interfere with your doing your job. He said he thought the opposite like Representative Carter-Peterson had asked at one of the first of these meetings that that was a violation but he has come to learn from Ms. Benoit and from others, and she has verbally communicated with Robert Boland at civil service to confirm that. The case law says that there is an expectation of privacy with emails private, personal emails even when done on public machines, which is spelled out in his memorandum that he would get them a copy of before he left the meeting. He said it states in one of the case laws cited, similar to the use of a public phone to make a personal phone call, you have a right that is clearly established and if it were not so, he would not be making this fight.

Representative Ligi said he was surprised to see that line of case laws, but asked if in any of those cases prior notice was sent to employees to not use this for private purposes. Commissioner Donelon said he did not know.

Representative Karen Carter-Peterson said that they go back with this issue a long way. She stated that in 2007 they sat in the very same room and talked about the provision that was to be added in a piece of legislation to address the issue and pointed out that Mr. Donelon and Mr. Theriot were trying to work something out prior to the March 2008 confidentiality agreement. She said Mr. Donelon asked the committee at the time not to do anything because there was language being proposed in legislation to pass that session to address this issue of confidentiality. Commissioner Donelon said that he did not remember such regarding legislation. Representative Peterson said she would pull up that information. Commissioner Donelon said he did not remember any such and does not believe it is possible to legislatively overrule the constitutional protections that are at issue. He admitted to learning everyday something new about the nuances of this very broad and extensive issue.

Representative Peterson said it baffles her that he has selective amnesia and cannot recall something that was discussed so fully, and that she pulled back because of good faith in his office to move forward. Commissioner Donelon asked what legislation she was proposing. Representative Peterson said back in 2007, and she would find it and provide it for him, since he had forgotten it. She said Mr. Theriot could probably cite it off the top of his head, but we stepped back away from that, and maybe Ms. Bowler who was on the committee....you do not remember it either.

Representative Peterson asked for more information regarding his earlier statement that the state auditor provided him some information about sexual or potential sexual harassment. Mr. Donelon said the auditor's office received a phone call presumably at their office and they came over to our office and said they wanted a copy of all our emails because they were investigating this threat on an employee in our office that had come in a couple of days before. Representative Peterson said so they provided this information to you, and then you took some steps afterward. Mr. Donelon said his office brought in the people from the alleged division and tried to find out if there was any truth to the harassment and they contacted LLA to get more information to take to state police, the appropriate agency to investigate and to protect state employees from such activity.

Representative Peterson further questioned Mr. Donelon regarding the phone call received by the auditor's office and how his department handled the situation. Representative Peterson asked if the phone call and the information they transmitted was considered public information or personal information. Mr. Donelon said he guessed both. Representative Peterson questioned if it were about sexual harassment and individuals. Mr. Rubin, attorney for the Department of Insurance, said they had no idea who made the phone call, only that Kevin Kelley and Buckley Crowe from the Legislative Auditor's office came over and informed them that they received this call, in fact said that Mr. Theriot received the call. Representative Peterson said she has the facts, and asked if based on the information provided did the Commissioner acted in an investigatory role.

Mr. Donelon said the auditor came requesting all of their emails dating back seven months. Representative Peterson said that she is asking if this is a personal phone call and if the information provided is personal or private or is it public. Mr. Donelon said it is both in my opinion. Representative Peterson said but if it is both, should the Legislative Auditor have this information and is it protected. Commissioner Donelon said he was not trying to get it. Representative Peterson said but you got it. Mr. Donelon said no, he was told that an anonymous call was received by their office that contained this allegation and they wanted to investigate it. Mr. Donelon said that they wanted to protect their people and took steps to do that, going to the appropriate agency, the one that they worked with for over a year to put handcuffs on two of their employees in that same division and take them out for selling licenses without passing the test in a prior investigation by the right investigatory agency, the Louisiana state police. He added that they work with every day on insurance fraud issues and that is who does, under *Kyle vs. PSC*, have investigatory authority, not the Legislative Auditor.

Representative Peterson stated that Mr. Donelon cited the United States Constitution and the Louisiana Constitution as protection for some of this information. She shared about a case in Detroit with former Mayor Kwame Kilpatrick who is now in jail, because he was using his *Blackberry* with another employee transmitted personal information. The purpose of the investigation was not necessarily to elicit the information that ultimately was divulged, it was actually an ancillary issue related to dismissal of a law enforcement officer, but ultimately other information was elicited that caused him to step down. Representative Peterson questioned why any employee including Mr. Donelon would think that the use of a public device that records information would in any way be withheld from the public ground.

Mr. Donelon said he would provide for her the provision for the memorandum they filed that morning because it is directly on point to her question. He said that he shared her and Representative Ligi's surprise at what he had been told by multiple attorneys whose opinions he respects that are on this case. Representative Peterson said let us say for example that you are right, that everything that you are suggesting in all of your pleadings are right. You have served as chair of the Insurance Committee, as I have and now Mr. Kleckley. Mr. Donelon said Senator Cravins in his goodbye remarks said that nothing you do will go unpunished, that any vote you cast on either side of an insurance issue will come back to bite you politically.

Representative Peterson said because of the history of many of your predecessors the heightened concern and need for transparency certainly as a public policy issue should out way, in my opinion, some of the things that we are discussing right now. The state's fisc with the economic downturn we are facing, these kinds of things should out way - not out way the law, first of all subject of interpretation of the law. Representative Peterson said she would throw *Kyle* out the window for the mere fact that Representative Ligi just stated, it was a performance audit and you cannot compare apples to oranges. So give me a case that is on point, we are not talking about a performance audit, we are talking about a financial audit with a Legislative Auditor, that is not hard to discern. We are both lawyers, we start out with the case dealing with, what are the facts, are they analogous. Well these are not, so how do we keep citing this case with no factual analogy or consistency. You say that he is using selective terms and he chooses not to use performance.

Mr. Donelon said no, he chooses not to use investigative. Representative Peterson said so he did not use performance either, are you suggesting this is a performance audit? Mr. Donelon said one time it is financial, and the next day it is compliance. Representative Peterson asked is it performance? Mr. Donelon said he does not think the auditor uses that term. Representative Peterson said if it not performance, why are we citing *Kyle*. She asked if it was the closest thing to give a way out, or easiest thing to put my hat on.

Mr. Donelon said that nothing has been worse about his job in the three years he has been there and a lot of people stop him on the street and say what a thankless, tough job he has. He said that Senator Cravins was right, no matter what you do as a legislator or as a regulator of insurance you are not going to win, it is a no win situation. Representative Peterson said she agreed. Mr. Donelon said take all of that, combine it, add it, double it, triple it, nothing he has had to do for three years has come close to the burden he has had to carry in this dispute. And nothing has come close to harming his reputation that he values greatly, he welcomes all the malfeasance laws in the world, he will waive all of his attorney client privilege. He further said that he has seen and asked what all these emails entail and there is nothing to it, except what he gave to the Legislative Auditor and he gave to the Attorney General and they have indicted one Terry Lisotta for 10 years of expense account abuse that was horrific and egregious, but no one knew until he fired Mr. Lisotta.

Representative Peterson said that was absolutely not true, she would take in fact credit as the chair of the Insurance Committee for highlighting most of the incestuous behavior that existed prior to his arrival. She stated that people did not want to pay attention, many in the

insurance industry were very upset that she tried to highlight the many things that were going on. Representative Peterson said that she commends Mr. Donelon for coming in and showing leadership as well, but he alone did not do that. She offered to provide witnesses because of the challenges on many occasions sitting in those Citizens meetings, asking many hard questions about PIAL. She said there was a complete overhaul of PIAL as a result of her questioning. She brought up a meeting in a law office in New Orleans and the problem with the same lawyers representing both entities for years. Representative Peterson said some of the same lobbyists serving three masters, negotiating with themselves on contracts. She pointed out the people are paying for this today. She thanked Mr. Donelon for firing Mr. Lisotta, and commended her Insurance Committee for getting to the bottom of it. Representative Peterson stated that this legislature does have a roll, it is called checks and balances, and when you have checks and balances as we are trying to do right here, you ultimately get to the bottom of things. She said this audit committee has done a fine job and stated she hoped maybe the courts tomorrow would help it come to an end when they recognize that Kyle is not even applicable.

Mr. Donelon said that *Varnado and Corey v. Department of Employment and Training, Office of Worker's Compensation, State of Louisiana*, Louisiana Appellate First Circuit 6/28/96, 687 So. 2d 1013 writ denied 3/27/97 holds state employees had a reasonable expectation of privacy in their state provided office, desk, filing cabinets, and computers which expectation was unreasonably breached as a result of a search, whether or not there is cause for search is not relevant to the question whether constitutional rights were violated and damages were incurred. That government employees have an expectation of privacy in the workplace protected by the United States Constitution is well settled in *O'Conner v. Ortega*, 480 U.S. 709, 724, 725, 107 S. Ct. 1492 in 1987 the United States Supreme Court held and he quoted "as with the expectation of privacy in one's home such an expectation of privacy in one's place of work is based on societal expectations that have deep roots in the history of the Fourth Amendment". 480 U.S. at 716 quoting *Oliver vs. United States* 104 S. Ct. 1735 (U.S. 1984). He said that he could continue but the rest of it says the same.

Representative Peterson said they learned back in law school that you can cite all the ruling in every case, but if you do not have the facts of each of those cases to see, for example in that case when a cubicle was searched, what was the outcome of the search, what was the information used for, and what was it obtained for. She asked Mr. Donelon if he knew the facts of that.

Commissioner Donelon said he did not, but does know that two lawyers whose opinion he respected greatly – one being Assistant Attorney General assigned to his office full time for the past seven years, Virginia Benoit; and the other being David Rubin, outside attorney whose reputation Mr. Speer confirmed to him last month. Representative Peterson said great lawyers. Mr. Donelon said also his opinion, and they have both told him that this is all four corners square on the law relative to personal emails. Representative Peterson said she does know that lawyers work on both sides, and she knows that when they get paid they put the best case forward for whatever they are trying to accomplish, depends on who is paying. Mr. Donelon said he agrees, no doubt.

Representative Peterson reiterated that these are public instruments, public computers being used and while there is a reasonable expectation, is it unreasonable for someone who uses a public computer to expect that someone might look at, not necessarily use the information against them, but to look at it. She said what you are saying is that it is unreasonable for the Legislative Auditor to have access to look at this information even if the information is not used, even if the confidentiality agreement exists to protect the misuse of the information by the auditor. She further stated that he is allowing other public employees, private contractors, Attorney General and Inspector General to look at it, but not the Legislative Auditor, because it is a legislative branch.

Mr. Donelon denied all that she enumerated. He said there is a constitutionally protected right of privacy that he cannot waive to the legislative branch, there is attorney client, proprietary privilege, fraud investigation statutes that are confidential, and deliberative process. He said the only ones of those that he is continuing to assert as to the separation of powers argument contained in *Kyle vs. PSC* is attorney client and deliberative process, the privacy is covered by a plethora of federal and state decisions.

Representative Peterson asked when does the public fisc ever take precedence over any of this. Mr. Donelon said in all of these cases it says anything financial is totally made available, and they have done that as every time he has been part of the Department of Insurance since 2001, and resulting in 2006 a 100% clean legislative audit report. He said they made then and they made last year, and they will make this year, every check, every spreadsheet, every financial document regardless – email, paper, check available.

Representative Peterson said at Joint Budget on Friday the Division of Administration said that they could not produce what they needed to produce as far as the CAFR, and asked Mr. Donelon if he was familiar with what happened. Mr. Donelon said he was familiar from what the Legislative Auditor said regarding the CAFR. Representative Peterson said she understood the gentleman at the table to say that he could not provide a clean statement because of the lack of the information from Citizens. She added that this information could potentially impede our state fisc in a multitude of areas.

Senator Gautreaux addressed Mr. Donelon regarding Citizens' increase rating that affected some of the people in his district. Mr. Donelon stated that the actuaries for Citizens said Vermillion Parish and those local areas were not justified for rate increases. Mr. Donelon rested on the "letter of the law" based on what the statute said for his decision to approve the rate increase. Senator Gautreaux asked Mr. Donelon if the "letter of the law" only what he believed the "letter of the law" to be, because in this case, the way the law was written, he had an option but he repeatedly said that he did not.

Mr. Donelon said his actuarial department reviewed the filing as filed, which calls for a dual track of rate increase evaluation and the taking by parish of the higher by parish that dual track examination reflects, and if he had approved the actuarial based filing, he would have approved a 14% statewide rate increase on policies on average in Citizens statewide. He rejected that because his actuary has protocols that do not justify approval of the rate filing based on the data provided. He stated the other track, just as was criticized for the rate filing of four years ago by the Legislative Auditor when they threw out the outliers. Four years ago, the outliers were companies that answered the survey with numbers that were clearly too high in which two companies flubbed the mission by providing bad information. Therefore, rather than Terry Lisotta and the actuaries in house redoing the survey due to the bad information given the Department of Insurance made an executive decision to comply with the statute that requires an annual review and increase in Citizens policies.

Mr. Donelon said subject to the rating commission's approval back then, on recommendation of our actuarial department, threw out those two outliers and approved a lower rate increase based on what they knew to be reliable data. He said the recent filing that was sent to him, that Senator Cravins and Senator Gautreaux wrote and asked him not to approve, it was filed with his as required by statute on the books for five years. Mr. Donelon said it was filed with him, requiring him to do the dual track analysis. His actuary came in and said the actuary track is defective and cannot be approved but the survey track, just like the one four years ago, is based on accurate information. He explained that not like the one four years ago that was defective with outliers, it is in accordance with an appropriate survey.

Senator Gautreaux asked if the actuarial department verified that previously too or was that just brought to their attention after the fact. Mr. Donelon stated four years ago, he was not there, it was the rating commission and was working under the department as chief deputy, but he was not involved in it, but would have denied it. He said that they caught the outliers four years ago, and recommended throwing it out as opposed to starting over again. This time they recognized the defect in the actuarial track, which resulted in decreases in Senator Murray's area. Mr. Donelon said he received calls while on WVOK.

Senator Gautreaux asked if Mr. Donelon was from Metairie and if they received decreases also. Mr. Donelon said his area received 25% increases. Mr. Donelon stated that he did not have the authority to deny the increases due to the law that states he has a duty to review and approve and do what the law requires him to do.

Senator Gautreaux questioned Mr. Donelon as to what was the law that the legislature passed requiring him to do. Mr. Donelon stated to make available the documents, but that law conflicts with other law. Senator Gautreaux said that is your opinion, you said it earlier, and as Representative Peterson said, you thought it was public and private. He asked if Mr. Donelon chose as the Commissioner to say they were going to file a suit and go to court.

Mr. Donelon reported that he ultimately chose to by the advice of counsel. Senator Gautreaux said Mr. Donelon, ultimately you had that choice when it was chosen on the other issue that dealt with whether you could approve or disapprove. He added that the citizens of his parish would not have filed suit against Mr. Donelon because he did not raise the rates, but insurance agents might have done it. Mr. Donelon said but his (referring to Senator Murray's) citizens might have. Senator Gautreaux said the fact is actuarially none of them deserved the increase and your actuaries for Citizens stated that. Mr. Donelon said his constituents would not have gotten their reduction. Senator Gautreaux said we all know who wrote the laws, and he asked if Mr. Donelon was there when the law was written about Citizens and when they came into effect. Mr. Donelon said 2003 actually, but he left the legislature in 2001. Senator Gautreaux said the statute is based on the opinions of our attorneys and you could have

denied that. We are already paying over the actuarial rate, so why not investigate insurance companies for errors being as you approve their rates.

Mr. Donelon said he has only approved a 2% homeowners' rate increase in the past year. Senator Gautreaux said probably due to the drastic rate increase prior to his becoming the Insurance Commissioner. Mr. Donelon said true because the last year of the rating commission the rate increase was 3 ½% but the year after Katrina & Rita it was 12.5% which over the past three years 17% cumulatively.

Senator Gautreaux inquired if Mr. Donelon could require them to file rate reductions and if he had the right to approve or disapprove insurance contracts annually. Mr. Donelon said he could not because he is faced with a sunset proposition on policy forms due to some insurance companies, like Louisiana Farm Bureau - a 20 year company ignoring newly added statutes, thus having multiple violations, but they are still in the form.

Senator Gautreaux states this is a big discrepancy and a factor affecting the rates for Citizens if one company could write a homeowners policy for a \$150,000 home and charging \$8,000 but other companies such as State Farm, Allstate or Shelter Insurance reflecting they want to write a policy for \$1,500. Mr. Donelon said he did not understand and that it is possible and therefore needs to be revisited. It is possible that some companies are pricing themselves out of the market in small communities. Mr. Donelon said he was open to discussion but he wants to charge the top rate plus 10%, the real top rate, not somebody pricing themselves out of the market. When questioned by Senator Gautreaux if that was Mr. Donelon's actuarial rate. Mr. Donelon answered no, stating that it was based on the survey rate.

Senator Gautreaux questioned if the true actuarial rate would take into account the company's assets and where they are writing policies. Mr. Donelon said if he had relied on the actuarial track filing it would have been a 14% statewide increase, but by using the survey track it ended up only being a 7% rate increase. Senator Gautreaux said that a representative from Citizens said actuarially there was no justification for a rate increase. Mr. Donelon said the Citizens representative that went to the hearing in Abbeville is the one who submitted what his actuary said was defective information. They agreed to discuss further later.

Representative Richmond said part of Mr. Donelon's stated objection is to the expectation of personal emails. He pointed out that the Administrative Code regarding agency responsibilities states that each agency should disseminate to their employees notice that uses of an agency's electronic messaging system should not expect a right of privacy, and that the electronic messages may be monitored for compliance and abuse. Senator Richmond questioned Mr. Donelon if he was in agreement that once you send notice stating you should not expect privacy when using electronic messaging, at that point they do not have a reasonable expectation of privacy. Mr. Donelon agreed, but stated that is not the law. He said that the same person that told him that it is not the law, is the person who sent out the recommended message to their 300 employees that they do not have the expectation of privacy, but in fact they do have it.

Representative Richmond asked if Mayer & Associates handles all of DOI's IT work and whether they are in possession of, or have access to information that is in question. Mr. Donelon stated that they do not handle all DOI's IT work, but a good part of it. Mr. Donelon went on to state that Mayer & Associates has partial access to some of the emails as needed for whatever their particular part of the IT operation is, just like his employees. Mayer & Associates is blocked from certain information. Also the system automatically requires that Mr. Donelon change his password every ninety days.

Representative Richmond further asked what duties are performed by Mayer & Associates to receive monthly payments \$28,000. Mr. Donelon stated he did not know and that they work in his IT department with his full time of less than 6 civil service IT people who actually work in their building and outside doing work for them on their computer systems, basically program work. Representative Richmond stated his concern was when he viewed Mayer & Associates' website to look at some of their clients, which they only listed a few including the Department of Insurance and Louisiana Insurance Guaranty Association - who else do they represent that may pose a concern for us. Mr. Donelon stated he had no idea, and that he had never heard of Mayer and Associates until he came to this meeting. He stated the one individual whose name has been mentioned here works for DOI and comes into his office to fix his computer when it is on the fritz. Representative Richmond stated his concern, and not suggesting this is the case at all, but in this fight over financial records and Mayer & Associates having access to some of the emails, what prevents them from protecting another one of their clients by deleting an email from one of their clients. Mr. Donelon said the same thing that protects those folks from being injured by their actuarial division who looks at their proprietary information, or solvency shop which looks at their financial data reported electronically on a quarterly basis and annually. Mr. Donelon said there is a myriad of different

folks employed by them that have job related duties that require them to go in and out of some of these electronic transmissions, and nothing except criminal law and conscience stops them from damaging.

With that assumption, Representative Richmond pointed out that the Department of Insurance employees, and giving Citizens the benefit of the doubt, that they do what is right and have no vested interest one way or the other. Mr. Donelon responded like every other state agency. Representative Richmond also questioned Mr. Donelon as to how do we give Mayer & Associates with private clients, some of which can be the same people involved in the emails, access to information which our auditor does not have access to. Mr. Donelon said operation of law. Senator Richmond informed Mr. Donelon that Representative Peterson was referring to Resolution # 259 which was passed at a special meeting of the Insurance Committee, directed to PIAL, Louisiana Automobile Insurance Plan and Citizens, which would allow the auditor access to what he needed. This did not include the Department of Insurance due to the Department verbally agreeing to cooperate.

Representative Richmond's final question was how much will DOI spend on this fight. Mr. Donelon said Senator Morrell previously asked in this same room how much had been spent at that point on this fight. He said his answer was nothing, unless you take into account cost for him and Attorney General Benoit, who have been paid full time for seven years, and what other things that they could have been doing when they were filing the lawsuit that resulted in the settlement that the counsel has been given a copy of today. Mr. Donelon said he hired outside counsel only when he was threatened in August with the cut off of his funds if he did not capitulate to the demands that he was told by Attorney General Benoit that he was, by law, prohibited from capitulating to. Mr. Donelon said he does not know how much he has paid them, nor how much their hourly rate is, and he does not know how much it will ultimately cost to conclude the fight.

Mr. Donelon said he does know that last year they gave the state general fund over and above their operation from their fees that they charge for their operation \$10 million dollars back. He said that he was told last week that they will give back an additional \$2 million this fiscal year in addition to that \$10 million. He also shared that on Friday, he is going to meet with the Commissioner of Administration and try to accommodate a request that they cut their \$29 million dollar state budget by \$5.5 additional million dollars by laying off 60 employees. He explained that by cutting back on their services at the department and by furloughing all of their employees 5 hours per pay period, they can take that fee generated money that is supposed to not be a tax, and should break even on operations, and give it back in addition to the \$12 million that they are already scheduled to give back to the general fund, give an additional \$5.5 million.

Representative Richmond stated to Mr. Donelon that on one hand he would give the auditor the documents except that he is prohibited by law from doing that, however, on the other hand Mr. Donelon is saying that his department is charging fees over and above what it costs to run his office, which then changes it from a fee to a tax, but the Department is still collecting the fee. Mr. Donelon agreed and replied sue me, and asked do you want me to stop, ok.

Representative Richmond answered in the affirmative and stated if we are going to say we are not going to violate the law, then let us be consistent. Mr. Donelon was in agreement. Representative Richmond stated it goes for both sides, and that the fight we have between the Department of Insurance and the Legislative Auditor is at the citizens of Louisiana's expense and with hopes to resolve this matter. He wants the two sides to get together to expedite getting this matter straight to the Supreme Court. Representative Richmond said that he knows that Mr. Donelon's lawyers have told him that he will bear some personal liability if those records get out. Mr. Donelon said well, let me add this, that I would be doing the thing without that threat. Representative Richmond stated he did not know if that helped or hurt Mr. Donelon's argument. Mr. Donelon said he did not think it did. Representative Richmond further went on to state that we have an auditor who has very strict audit guidelines and confidentiality rules in which they cannot reveal any documents, whether it is by a public records request or a subpoena.

Representative Ellington stated to Mr. Donelon that the Legislative Auditor is faced with some of the same things that he is faced with and that the law states that the Legislative Auditor cannot give the Department a clean audit if all the information is not given that he deems necessary. Mr. Donelon stated he was told that the Auditor could give a clean audit with a footnote, just like the audit firm that was hired to do Citizens audits that were finalized under the new administration last month. They had footnotes as well, but they are clean audits to the degree that we are now on our way to New York to refinance our default bonds, \$300 million worth that are costing us default rate double digit interest. Mr. Donelon went on to state that he does not challenge the Legislative Auditor's interpretation of his law, his duty and his

responsibility, with the exception of the Public Service Commission, in reference to a discussion in a previous committee meeting. Mr. Donelon stated he learned that the day after the law went into the effect his funds could be cut off. Senator Marionneaux was recovering from surgery but took the time to answer the question regarding his intention of the new law, and said this was not meant for state agencies, this was meant for these NGO's that we are giving money to that do not produce records that we need.

Mr. Donelon continued to state that the Legislative Auditor has statutory needs that conflict with the laws that limits his ability to give information to the Legislative Auditor such as personal emails, attorney client, and deliberative process emails, which he had never been asked for before, and to his understanding, no other state agency except Public Service Commission has been asked this information before. Mr. Donelon continued to reiterate about the emails in that he has an in house Assistant Attorney General that works full time for the Department and is paid 100% of her salary along with two Assistant Attorney Generals which resulted in the compromise that the council has before them. Mr. Donelon gave further background on past issues with permission given to his Assistant Attorney General to file his lawsuit.

Representative Ellington asked Mr. Donelon how can the Legislative Auditor give the Department a clean audit if they are unable to see all emails. He stated that it is not an audit if he or someone in his Department is going through and selecting the emails. Mr. Donelon replied that he does believe they want these questions answered by the courts. He has been trying to get the Legislative Auditor to go hand in hand to the court on an expedited basis and resolve this issue but they have said repeatedly they do not agree with the First Circuit Court of Appeals decision, which is what I am being told requires me to do what I do.

Representative Ellington questioned Mr. Donelon regarding access to the financial audit which he states the Auditor has always had access to. Mr. Donelon expressed his concern that the Auditor is asking for the world of all emails for a three year period – incoming, outgoing, internal, and according to his lawyers, the Auditor is entitled to every financial email – incoming, outgoing, internal, but they are not entitled to the universe of all other emails.

Representative Ellington asked how do they know the ones they did not get were not financial. Mr. Donelon said because we get subpoenas all the time, every agency gets subpoenas all the time, and it is a felony for me to not respond, and I do not even see the responses, my staff does it. It is a felony for me to respond and not give all of the data that I know is relevant to that subpoena. Representative Ellington said but if your staff does it, you do not know. Mr. Donelon said that is right, but if they do it illegally, corruptly to secret something, or cover something they are felons.

Representative Ellington asked how many Insurance Commissioners have gone to jail, so there are some felons involved in this state, though I wish that was not the case. Mr. Donelon said absolutely, I wish I could accommodate their investigative audit request, but the law does not allow me to because the law says they do not have the power to do that. Representative Ellington said if they looked at it, and it is not financial, it just goes back because that is not something they are looking for. Mr. Donelon said but people have a right to the expectation of privacy, the Governor has a right to attorney client privilege, I have the right to deliberative process privilege.

Representative Ellington asked Mr. Donelon what will you do tomorrow if you lose. Mr. Donelon said comply - if I lose, you get them, now I will continue the appeal if I can, but I will give everything if the court orders me to it. Mr. Donelon said no, tomorrow is just the injunction, I am sorry. All I am asking tomorrow is for protection again having my funds cut off. I do not know what I will do if I do not get that tomorrow. But I will do this, I will sign that consent agreement tonight or tomorrow and I will go jointly, if he does not want to do that, I will go jointly to the court the next day with a joint petition to resolve these issues for all of state government. So it does not happen to me or anyone else again.

Representative Ellington said so without this committee granting you an extension, and if the court says "no" tomorrow morning. Mr. Donelon said I am painfully aware of that predicament. Representative Ellington said that seems like not exactly the smartest thing you could do, I am just at a loss for words. You might ask us for an extension, and according to the pleading you did ask for one, but you just did not get it.

Mr. Donelon said the problem is three weeks ago my lawyer, to give him time to do his memorandum that he filed at 9:00 a.m. this morning, he had asked for that extension of time. Representative Ellington asked who did he ask. Mr. Donelon said the eighteen people from the Legislative Auditor's office that were in the meeting with him. Representative Ellington said as I appreciate it, he is not the person to ask, you should have asked this committee. Representative Ellington said I am just saying that if your lawyers are correct and they know

then the Legislative Auditor was not the place to go to ask for the extension, he granted you the only one he could. This committee is the only one that could grant you another extension and I can say I was never asked for an extension. Mr. Donelon said I am acting on my lawyer's advice. Representative Ellington said you are a pretty good lawyer yourself. Mr. Donelon said no, I have not had a shingle or malpractice insurance in seven years, so I strenuously stay away from practicing law, but I am advised that I will get the injunction tomorrow morning and that will give us an expedited path to a legal resolution of these issues. Representative Ellington asked if the judge had already made up his mind. Mr. Donelon said no, he did not even know the judge's name until a month ago.

Representative Ellington asked if Mayer & Associates have access to all of the emails. Mr. Donelon said in that they work in our IT department as contract employees, just like our civil service employees do, but they do not have access to my emails or his because he has a password and they cannot get into his email files or anybody's email files. They do primarily programming, drawing up programs and they fix my computer when it breaks.

Representative Ellington said you are telling this committee then they do not have access to the emails. Mr. Donelon said that when Rod Wise comes up to my office to fix my computer when it is on the fritz, he goes out in my secretary's area and tells me to log on and use my password and then call him back in, when I have logged on, so that he can work on my computer. Representative Ellington said when he does that it does not matter who got in there, once he gets in there, you put him in, he has access to what is in your computer. Mr. Donelon said that is true, and my data does not have his, because I do not have access. Representative Ellington said if they work for you then I am assuming they get a state check withholding comes from the state. Mr. Donelon said no sir, they are independent contractors, and they get a 1099 at the end of the year. Just like Mr. Rubin, the lawyer that is representing me, he will get a 1099 at the end of the year.

Representative Ligi said Commissioner you know I have a lot of respect for you, but I just want to try and summarize where you are at from a position standpoint, and that is # 1 you are willing to waive the attorney client privilege. Mr. Donelon said yes, sir. Representative Ligi asked on deliberative process, where are you at on that. Mr. Donelon said the only issue I have Representative is....I don't want to render moot after two years of pain and suffering, getting to this point to resolve this issue.

Representative Ligi said but I do not know that that answers my question. Are you still asserting? Mr. Donelon said I do not know if I will waive it or not. Representative Ligi asked on proprietary, if waiving that. Mr. Donelon said I am waiving that, actually in my memorandum described it as having been rendered moot by my having sent a blast email to all companies that their information is being requested. Representative Ligi asked if the waiver that you are making, the ones that you just mentioned, are you doing that personally or as Commissioner of Insurance. Mr. Donelon said just like you are being asked by one of the lawyers involved in the litigation to ask that question, I am going to not answer it because I think my lawyer would want me to withhold answering that to keep the issue alive.

Representative Ligi said basically, what you are telling me is that you want to keep the deliberative process, not waive it. Mr. Donelon said that is correct. Representative Ligi asked also on the constitutional issue, you also are relying on that. Mr. Donelon said I do not have the right to waive.

Senator Murray said Commissioner when Mr. Ligi asked you a question, you said he was asked by one of the lawyers in the litigation to ask that question. Mr. Donelon said Mr. Speer just came over and whispered in his ear when he was questioning me, that is what I am assuming led to that additional question. Senator Murray said it is just astounding that you could know what Mr. Speers said. Mr. Donelon said Mr. Speers is an honorable and outstanding lawyer and he is a litigant in the litigation. Senator Murray said I appreciate that, but it just took me aback when you said he was asked to ask you a question by one of the litigants. Mr. Donelon said invalid assumption, and I do not know how I should answer that question because my lawyer is not here.

Senator Murray said I can appreciate that answer, but I am just saying to say that about Mr. Ligi's question. Senator Murray asked to have the auditor back at the table and the gentleman from the Treasurer's office, so all the council could understand how this process will go. Senator Murray said to currently we have an extension granted to DOI through January 31st. The Commissioner said he does not want an extension from this council, so how should the process flow Mr. Theriot and the Treasurer's office, so we will know the consequences going forward from this day. We do not know what the courts will do tomorrow, but assuming what we have in front of us today.

Mr. Theriot said first of all, the extension was good through January 31st. On January 31st if the Department of Insurance does not come into compliance with the audit law they will be placed upon my non-compliant list. The non-compliant list is made aware that both the Treasurer's office and the Division of Administration and other agencies, this is not restricted to state agencies, this also applies to local governments whereby any dollars that flow through the general appropriations bill, they have to view that to determine whether or not they receive any money. It could even be a non profit that is not in compliance. We had some hospital service districts, municipalities who have been on that list before. So they go on the non-compliant list which the Treasury and the Division of Administration will view and at that point in time will comply with the law that was passed as far as the issue of not being compliant and forwarding funds.

Senator Murray questioned that once that gets there from your office, from the Treasurer's perspective that office will not send dollars forward. Mr. Napper said there are two statutes on the books that say we cannot do that and we have been honoring those statutes ever since they passed. Your city was on that list for a long time and they got extensions and we paid them. Senator Murray said that is correct. Mr. Napper said now we have never been faced with a state agency, the Treasury does not directly make most of the payments, anything in the state accounting system such as payroll comes through the Division of Administration. But the auditor will notify us and the Division of that and then we are faced with complying with the state statutes or not, and we are going to comply with them.

Senator Murray asked if anyone from the Division was present, no one responded. He asked Mr. Theriot if the Division, with respect to this law, have they been been cooperative, have they followed it when you put people on this list, does the Division also not forwarded payments. Mr. Theriot said the Division, both from the general appropriations bill and capital outlay bill have in the past made inquiries who were on there and as far as I know has not provided funding for those entities that were on the list. And as you know that when an entity, aside from the fact of the meeting of this body, if an entity is on the list and if in between meetings an entity does become compliant, I automatically take them off the list, I do not have to wait for a meeting and what that means primarily is almost like a suspension of those dollars. Let us just say for discussion purposes, if the Department of Insurance had a warrant that went out and said they needed "x" amount of dollars on this date and they missed it (not being in compliance), and the second one came and they missed it, a third one came and they became compliant, they would get all those previously suspended draws that they had made their requests for and any ones in the future. So they do not lose the request, it gets suspended until such time as they become compliant.

Senator Murray said practically speaking, when would the Department feel the impact assuming the court does not do anything about this, when would feel the impact of not receiving any dollars. Mr. Theriot said I think they have a payroll period coming this week, that would not effect this week, it would be whenever their following payroll period is, and I believe the Division needs to know the Wednesday or so before because the Division of Administration does the payroll for the Department of Insurance and they have to alert the bank I think by three days before, whatever that time frame is before. So you are talking about after this week is the 30th, for the two week period, if it's payroll – any other order will come from the Treasury's Department would be separate and apart from that.

Commissioner Donelon said I did not know that the City of New Orleans has been through this process for a prolonged period of time. Senator Murray said just so you would know, it is not just the City of New Orleans, there have been several non profits, hospital districts, school boards, police juries, all over the board. Mr. Donelon said I just huddled with my in house lawyers and Deputy Commissioner for Management Finance and asked, without access to my lead lawyer on this issue, whether or not I should come back here and ask you, which frankly I came over here thinking I did not have a snowball's chance in Hades of getting an extension, that this was going to be a hostile hearing as opposed to an information hearing, as it has truly been.

Mr. Donelon said I am perfectly willing to ask for a 30 day extension, which I recognize will moot my hearing tomorrow morning if there is hope in resolving this matter through either the reinstitution of that consent agreement or the joint petition to the court to reconcile these issues which I would prefer and I do not know what the court is going to say. I am told we have a cerebral, conscientious judge who has always done criminal since he has been on been on the bench, and he is new to the civil side. I think these issues cry out for resolution and I think they can be resolved through this means, therefore, I prefer the joint petition to do that. I am willing to go back to the agreement we entered a year ago, and I am asking the committee to render my hearing tomorrow morning moot by giving me another thirty day extension. I would ask if they are only going to give me 30 days please give me the same accommodation that I was given in the phone call on December 26th of a chance to get back to court if we do not resolve it. But that is up to the committee as you know.

Senator Murray said I will speak for myself, I know that I talked with the Senate President last Friday after I was told there was going to work out some kind of compromise to have a further extension and I will tell you that the members of the legislature, talking on the Senate side anyway, want this issue to get done and resolved. There was not much feeling, and I don't want to speak for the Senate President, I guess we could do a conference call or something tonight or tomorrow, but the impression I received is that they want this issue to get done and they were not in favor of another extension. Mr. Donelon said that was my impression too, Senator, and I understand that. Senator Murray said I do not want to speak for him and I will just say this for me talking, I just do not think it is a wise idea to have this litigation out there, where in essence we are being sued for a statute that everybody else, and I understand that you have taken this on as a mantra for yourself and your department, but everybody else seems to comply with.

Mr. Donelon said no sir. Senator Murray said yes they have Commissioner, I am just saying we have not had anyone else to come to this table. Mr. Donelon said no one else has been asked. Senator Murray said I do not want to debate that with you, I really do not, all I will say is we have had people that have not been in compliance who cannot get an audit done, but because of working with the auditor's office, he has recommended to us that we grant extensions because they were being cooperative and working with them, and I think in large part we have always done that because they were being cooperative. Senator Murray said I just do not know what kind of message this sends to everybody else for somebody to say I am not turning over information, I am not going to cooperate and get an extension. It makes everybody else think why should we do it, we would be saying to ignore the law - but that is my opinion. Senator Murray said what I wanted to know was just how it would play out, so that all of us would know when these things would take place.

Mr. Theriot said if I might in summation of some of the issues that were mentioned here earlier, I think very key issues. One is that we do audit DHH because of Medicaid and Medicare payments that are received, to assure there no fraud or abuse, and there is compliance with federal rules, so we get to see patient charts, information detrimental. We also see DED including contracts that they have. To give you an example: In one contract, if we had not reviewed it, DED had a contract to provide an upstart airline and approximately a million or less out of New Orleans International Airport who never had one airplane, extended it with no employees, so they were not in compliance with that. Those are just some of the many of the issues that we often time find. I believe the Commissioner is in good faith, but often times given information that is not factual. It starts with, and I know it is a slip, but again, we had the telephone conference not the day after Christmas, but the day after Thanksgiving, which is not a big thing, but it lends to the confusion that goes on. The confusion that his lawyer supposedly asked for an extension when he did not. Mr. Wise, the contractor sat in my office telling us that he developed some of the search terms and helped burn the discs of information from the ones that we had encoded to burn to give us, not what we had burned but substitute discs that he was involved in. Now what he actually saw, I have no idea. If he had been left alone, I have no idea, that is what I mentioned earlier about the chain of custody of the documentation has been such that we do not know. In terms of our audit, it is a financial audit and I can understand the confusion from the Commissioner and his lawyers about my staff. I have a compliance audit section, a financial audit section, and a performance audit section. We were doing a financial audit, but because of the risk assessment and the risk that has increased because of what we know from Citizens Insurance obviously things were different. Even the year before when he said he had a clean audit, we do not resample, we do not look at every single solitary email and or document - we sample and we use attributes to sample with. So we do not get to see it all, so I am not going to tell you the year before it went undisclosed, it is not uncommon.

Mr. Theriot said to tell you how we learn that there has been a fraud, something I came to realize is that we get it through Kinko's, or an anonymous fax - someone leading us to the inappropriate behavior. I wish I could tell you our skill sets were that so great that we could find it on our own, but often time it is the one who participates in the activity that goes array that gives us that information. Just as in the case here where we found these other issues.

Mr. Theriot said in terms of what is happening with the performance audit case that was in the First Circuit Court with PSC it was a performance audit, this is a financial audit, make no mistake of that. The financial audit report is out with the opinions and the one thing I need to share with the Commissioner, I know he made a statement here that Citizens got a clean opinion, that is not all true. Citizens got a clean opinion on a balance sheet but not the statement of operations. We could not give an opinion, and do not know if we can give an opinion next year. If you look at the statements that were generated from '06 and '07 that were not audited you would understand why - because the numbers make no sense. That is why we do not even know with the premiums that are charged whether or not Citizens can

sustain itself. I know they are looking at it by pure cash flow coming through but the results of operations can also be different from what is actually there, again it is unable to be audited.

Mr. Theriot continued that in fact the Commissioner's office was the one who reneged on that confidentiality agreement. They unilaterally pulled information from our view, and when asked to see what they pulled from our view, we were told that we had seen it once, but cannot see it again. There are 14 million emails and we are not looking at every one, we are looking at attributes. Even when the attributes were pulled, they were put aside and we did not look at the entire email on all those, we just did not have time for all that because we are talking about a voluminous amount of data to go through. The chances that these personal emails that he speaks of would get pulled out, unless they have something to do with the issues at hand, probably will not even be looked at, but we still need to have the entire population to look at. There is nothing magical, there is no witch hunt involved here, this is all to determine that the financial statements for the Department are correct. Regarding his statement that he would have a continuous audit, this very body voted to charge my office to do a financial audit for '07, and '08, which we are currently undertaking at this point. This is not something that I dreamt up, this is something that this committee charged my office to do at the Department of Insurance.

Senator Murray asked Mr. Theriot to notify the council, and the Clerk and Senate Secretary would also do it, if something happens in court tomorrow that may require us to meet again soon, please let the Chairman know so we can meet again.

Representative Ellington said from his understanding from what Mr. Theriot just said that Mr. Donelon will not allow him look at something he had already seen. Mr. Donelon said yes sir, I was not going to give him unredacted personal emails to take from the premises. Representative Ellington said I understood him to say that he did not want to take any from the premises. Mr. Donelon said yes, he did. Representative Ellington said I heard him say sitting at the table, he did not want to take any of those from the premises, unless he found one that just justified a finding that he would have to take that one, otherwise he leaves everything there, and you are telling me that since he has seen them already you are not going to let him see them again. Mr. Donelon said that is correct, under the terms of that agreement and in September of 2008, the Legislative Auditor became dissatisfied with the implementation of that agreement, terminated it effective October 23, 2008.

Representative Ellington said I am not worried about what happened back then, I am trying to get us through today and out of court tomorrow, and on with the process. You said you are willing to resign and go with Mr. Theriot to court. Mr. Donelon said that is correct, but unlike what we were doing before that was drawn up, we will take his global request and purge down to 2,000 emails and let the judge decide if those 2,000 are privileged.

Representative Ellington asked Mr. Theriot are he was willing to do that. Mr. Theriot said at the end of the day as I said earlier, the original disc that we burned these emails to had been strictly in the custody of the employees of the Department of Insurance. I know the Commissioner was under the impression at one time that we both had access and they were locked in some vault safe away that nobody would have access to, well that was not the case. Mr. Donelon said that was right.

Mr. Theriot said other individuals including Mr. Wise had access to these things and burned them and redacting, all I am asking now since it has been a year to go back into the Department of Insurance, have access to the systems, let us do the audit. Look it will take me some time and energy and costs to do it there, not take it off campus, with the exception as I mentioned earlier, if we find anything that I need to use for a finding. I will need to take that off so I can include that in my report. Short of that I do not want to have anything off campus, we need to view it all and have access to do our audit.

Mr. Donelon said he will not agree to that agreement, that is what he just said. Representative Ellington asked which part of it- did he not agree that if there is a finding that should be able to be taken. Mr. Donelon said I am not looking at the agreement right now, but I am ready to sign that agreement and let the court oversee it for either side non compliance. He is not willing to go back to that agreement, because he terminated it because he is willing to do more than that agreement calls for.

Representative Ellington asked Mr. Theriot if he would sign the agreement again today. Mr. Theriot said that agreement was signed when we had those other discs we were going through, but at this point and time, having lost the custody of the documents, I do not know what is on those discs. I need to have access to the system to go back and do my audit, do my attributes like I would normally do to any other state agency, no different than his.

Representative Ellington said you would have that. Mr. Donelon said that means he gets to look at every email, personal, attorney client -which I waived, and deliberative process. Mr. Theriot said again using the term "look at", I am not looking at each one, we are using the entire population to put in the attributes we have, if an attribute falls out that might have that, it may have that information.

Senator Murray said he had read through the agreement, and it has a lot of exclusions in there that gives the Department the authority to exclude things that the auditor can see.

Mr. Theriot said it originally when we got to that agreement, we had been for a long time in an issue of trying to get information and I wanted to get in and get out. The agreement that we had, aside from what we would like at those things, we could at least see what is saying he is asserting the privilege for, and all I wanted to see to make sure that there was nothing pertinent to the financial statements. If not, he could keep them, I could care less, but at the end of the day, he was telling me, you have seen them one time, you cannot see them again. I did not understand the issue.

Representative Ellington said if the members agree and by having a motion and a two thirds vote by the committee, I would like for us to go into executive session for about 10 minutes. Representative Murray moved to go into executive session. Representative Ellington said with no objections we will be in executive session for about 10 minutes.

EXECUTIVE SESSION

The Council went into executive session at 6:11 p.m. to discuss the request for an extension from Commissioner James Donelon on behalf of the Department of Insurance. Representative Ellington declared the public meeting back into session at 6:25 p.m.

Representative Ellington asked Mr. Theriot his opinion about granting the extension to the DOI. Mr. Theriot said that while the council was having executive session, he and Mr. Donelon were having a semi-executive session in the hall. He spoke with Commissioner Donelon and thinks his request for 30 days would be moot in terms of getting much accomplished during that time, and he was going to ask the committee for a 90 day extension and we chatted to continue to hopefully working towards some means to resolve this situation. With that in mind, as long as there is some good faith effort in that respect as I had mentioned in the very outset, I do not want to preclude anything from allowing us to work something out without going to court. I would be willing to recommend if he is asking for the 90 day extension, to grant him the 90 day extension while we work towards some amicable means to do so. Commissioner Donelon said I so request.

Representative Ellington asked Commissioner Donelon and Mr. Theriot if they both are willing to work together or is this going to be a 90 day extension, and 90 days from now we come back here and we are in exactly the same spot or are we going to have an opportunity for Insurance Department and the Legislative Auditor to work together. I am asking for a commitment from both of you that in 90 days we are going to work together to try to reconcile this difference.

Commissioner Donelon said the answer to that is yes. Mr. Donelon said the first person he went up to as we walked out of the committee room was Mr. Napper from the Treasurer's Office and he took him aside. They worked very closely on the Citizens Board of Directors and have been through some very difficult times with that role on behalf of our mutual agencies. He asked Jim (Napper) what would you recommend I do, am I being too unreasonable in where I stand. Mr. Donelon said he was quoting Mr. Napper to say, I would recommend that you go back in there, and I will come to the table with you, ask for 90 because 30 would not allow it, and then call your lawyer tonight or in the morning and get him to set a permanent injunction hearing within the next 90 days, which he can do. Put this before the court, if I lose he gets everything he is asking for, if he loses he keeps pursuing his rights directly to the Supreme Court while whatever, and I think as Mr. Napper suggested that is the only way to resolve these issues. I am willing to do that consent agreement which I think settles this time. But this issue is there as I see it and I know my friend Mr. Speer thinks I am a bull headed ideal log. When I was sitting where Mr. Ligi sits, I used to go to him for advice all the time, and many times his advice to me was be practical, Donelon, don't worry about the technical aspects of it, and he was right when he gave me that advice. But unfortunately Alfred, I sit with lawyers now telling me I cannot do this one, the way the practical solution would dictate. Ninety days gives me that opportunity to tee it up as they say and resolve it and put it behind us once and for all, not just for me, but for everyone similarly situated.

Senator Murray said I understand this 90 day thing, but asked what does that mean to us. Are you going to turn over the information in 90 days? Mr. Donelon said no, sir. Senator Murray said so that does not do anything for us. Mr. Donelon said yes it does, as Mr. Napper

described I have 90 days, not to go get a TRO tomorrow to stop my funds from being cut off, but 90 days to resolve all of these conflicted issues once and for all. Senator Murray said Commissioner, with all due respect, that is great but this issue is not going to be resolved in 90 days.

Mr. Donelon said if I lose it is, I am hear to tell you I quit - if I lose, if a court gives me the cover of saying you are wrong Donelon, it is over with and I will get that decision within 90 days, I do believe. If I win, he continues on straight to the Supreme Court to overturn my decision that I got, why doesn't that resolve it Senator?

Senator Murray said let me explain to you why, and I am speaking for myself here. This council has not granted an extension to any entity that is not cooperating with the Auditor, we have not done if for anybody, not for the City of New Orleans, not for the City of Shreveport, a whole bunch of school boards, police jurys, hospital districts, ports, you name it. The only time we have done it was because the entity that is in question has agreed to cooperate and move the audit along with the auditor's office. If we do this for the Insurance Department, everybody else could say if you did it for them, why do we need to cooperate with them. That is why I say it gets us no place.

Mr. Donelon said I think this will preclude this issue from coming back from a hospital district or a state agency or the Governor's office for the future. This will resolve it for me and for everybody else once and for all. Senator Murray said but it is not resolved, Commissioner, in 90 days, that is the point I am making to you. I know you practiced law longer than me. In 90 days we might get a decision from the District Court.

Mr. Donelon said that is what I am asking for. Senator Murray said I understand, you are asking for that, but that does not mean the judge will do it. I appreciate that, we would all like to go in and get dates and do all kinds of things, and then it will go up, depending on how the District Court rules, either go to the Appellate Court or directly to the State Supreme Court.

Mr. Donelon said it goes directly, I am not going to appeal, I give you my word, if I lose you have a precedent forever. Senator Murray said even if you get a hearing within 90 days, the judge can take it under advisement, we could be looking at something later this year, my only point is we have had a hard and fast rule, this counsel, that unless an entity was cooperating, and that means that whatever the auditor wants to have happen to get the audit finished, we have denied everybody else that has come before this council. I just think if we are going to do this for 90 days, Mr. Chairman, I don't know if we need, at least for this extension stuff, we should not even meet, it just kills the whole concept to me if we do this, that is just my opinion.

Mr. Theriot said if I might Senator, on that regard when we had the discussion I assumed that we would be working towards, I did not know we would be waiting for a court date, and that was why I said earlier I have always made recommendations where the entity was operating. I had prefaced my remarks earlier on by saying that, as long as we were working towards the end of doing so, I did not want to preclude anything from being worked out, but if we are not going to be working anything out from that standpoint, but go to court, again then the extension is moot.

Commissioner Donelon said Senator and Mr. Theriot, if I may, I had this same thought process on, he's right, the day after Thanksgiving - time flies when you are having fun around here - but I said yeah, I would work towards a compromise, there it is. I do not know of another way to reconcile this apparent irreconcilable difference other than a court ruling and so I am asking at Mr. Napper's prudent suggestion for time to get that done. I understand that you have never done that before, I respectfully suggest you have never had this conflict before either. I really think this is basic to what you all do, what I do, what he does, and it needs to be resolved.

Senator Murray said I understand that, but I will just say again we have done it before, but only when the entity is cooperating with the Auditor's office, so if we do this now, 90 days from now - we are in the end of January, so it would be almost into May - and then you hope to get a hearing date sometime in there, there are appeals to be taken. We are into next fiscal year, and we still might not have an unqualified audit.

Mr. Donelon said there are only appeals to be taken by your side, not by mine. Senator Murray said I understand that, but that still assumes we have a decision before the end of the fiscal year. Mr. Donelon said I hear you, and if we do not, then we will be back here. Senator Murray said not just that we are back here, but we get another unqualified CAFR, all those things happen again, the same things happen, it just doesn't resolve it to me.

Representative Ellington asked Senator Murray let us assume we do not grant it, they go to court tomorrow and the judge does say he can continue to be paid. I do not know what is going to be Mr. Napper's idea about that, but if that were to take place, how does the resolution of this problem get here any sooner than it would by granting the 90 days? And I hope that that is what we are all here for, the resolution to the problem with the least amount of embarrassment and hurt to any department or anybody, but if we do not grant the extension when does it become resolved, is it going to become resolved when it goes to the court and it winds up at the Supreme Court for his side? If we do not do this today, Mr. Donelon, I assume will be off the hook for saying he would not appeal, so when do we get to a resolution and I think we get to one just as quick by granting an extension as we do by rejecting the extension.

Mr. Theriot said I will hope, and I think you made a good point in as much as that tomorrow judicial proceedings are primarily to do with the funding, nothing to do with the issue. I would hope that the Commissioner had made previous statements about the confidentiality agreement or whatever the case may be, that we had previously done, but if in fact any extension of time is sitting out there, it may not be that, but be willing to sit down to resolve the issue without necessarily a court decree. I know he wants to carry the banner for every other agency, but there is no cry from any other agency looking for help to do so. Be either from the agency standpoint and/or from the Administration as far as I know and I would help if that would happen that he still would be willing to work towards an end without a judicial proceeding.

Mr. Donelon said I did not ask for this banner on behalf of all other state agencies, it just fell in my lap, and it is not backed with *amicus curiae* brief or whatever, and I thought of that and talked to my lawyers about going to the association of in house counsel that there is for state government who allegedly were telling my lawyers we are right behind you, we are supportive, but I do not need this burden and if we can come up with a solution that compromises it, I am happy to do that.

Mr. Speer said just as a further issue to present to you, the Chairman's point could not have been made any better and this is the best opportunity we have for getting this resolved and the only way it is going to be resolved and that is cooperative scheduling with the court to get the hearing on the declaratory judgment and get the issue of the statute's validity litigated. If in fact you do vote to grant, and if in fact the plaintiffs are not being cooperative with us in getting the scheduled and this is not about the Commissioner, when you get lawyers involved, everybody's schedules get involved. If in fact it becomes obvious that we are not making progress to having that hearing and having that judicial resolution within those 90 days, this council can meet again with appropriate notice and put the Commissioner on the list that day, so the impendence will be on the Commissioner and his attorneys to work with us to get that hearing scheduled as soon as we possibly can. It is not fact based, purely law, we do not have to take a lot of depositions, or do any discovery, just a matter of agreeing with the judge, what his schedule is, what our schedule is and having the hearing scheduled, getting the memoranda filed and going in and arguing the case.

Senator Murray said my whole thing is all that could happen without an extension. Mr. Speers said that is true. Senator Murray said that is my point, I guess maybe I have been talking about consistency for too long around here, but I do not know why we make an exception, because if we do this how do we tell all the people that sit at that table we are going to hold your money back if you do not work with the auditor. Senator Murray asked the Commissioner again - does that mean that if we grant you the extension you will turn over the auditor the information he wants?

Commissioner Donelon said I will work towards a compromise. Representative Ellington said he will work with him. Senator Murray said what does that mean though, willing to work with him? Commissioner Donelon said it means the compromise you have before you or some other version to resolve this matter short of 90 days or a court hearing. At the worst case you end up resolving it 90 days from now. Senator Murray said the only way to resolve it is to give the auditor the information he wants, and anything short of that is not resolving it, am I right Mr. Theriot?

Mr. Theriot said that is right, but at this point in time we have a situation that we have not encountered before where we are in court to deal with the issue. We have worked with agencies in terms of granting them extensions while we working towards an end to make things happen. And I guess in retrospect this may be as what Butch (Speer) was saying just now about getting it resolved, this may be an unconventional way of working towards getting it resolved, but if the court is going to be a place that will be a final determinant on what the law states, or the interpretation of the law is, then maybe that might be viewed another way in which, as long as the, and I don't mean this in a derogatory manner, as long as the

Commissioner and I am sure he will not be dragging his feet in getting it before the court to get it remedied. I mean to encourage the court to hear it as early as possible time.

Mr. Donelon said the last number my youngest daughter added to my speed dial on my cell phone was David Rubin and it is vibrating now, and might be him, and I will use the speed dial when I get out of here to call him.

Senator Murray said I will just say this and then be quiet Mr. Chairman, the only thing that has made the other entities cooperate is the thing that will hold up their funding. And so I just do not see us making any more progress with getting this audit done, having an unqualified audit, having the CAFR that we can put out without any qualifications until this gets done. I just think that the 90 day deal is just not going to get it for us, and that is it for me.

Representative Kleckley said Jim, you and I have worked pretty close in the last year and I have enjoyed working with you. I think we have accomplished a lot with insurance issues, homeowners- I think we have improved there, and I think there is some more improvement that can happen. Citizens is a good example. Citizens was a ship that was sinking without a rudder, you have helped correct that, we have plugged the hole in the ship, it has a rudder, we have a strong CEO there that has established a strong staff and continues to get better, continues to build reserves, and it continues to improve. At the same time I think it is really a shame that we sit up here and waste tax payer dollars for this, a year and a half that this has been going, and it is very obvious you are very passionate about what you believe in, and Mr. Theriot and several members of this committee are very passionate about what we believe in, and there is a serious difference there. But with all that said, and me being one of the only few people in this room that is not a lawyer, I think it is time to use a little common sense approach here. I want to make the motion to grant the 90 day extension and urge you guys to work this out. And I can promise you that in the end of 90 days if it is not worked out, in my opinion, that is it over with for me. And Butch has told me that there is a lot of latitude that we have if the judge does not grant it the way we feel like it should be granted, but I think that it is a shame that the amount of time that has been wasted on this, the taxpayer dollars that has been wasted on both parts is a shame. And I think this issue needs to be resolved, I personally believe like the Speaker was quoted in the paper as saying, it is a slap in the legislature's face that this issue is where it is today. With all that said, I will make the motion that we grant the 90 day extension.

Representative Ellington said Representative Kleckley has made a motion, and asked if any objection. Representative Richmond asked to say just two things and the first thing I am just trying to make sure that I have all the documentation understanding the legal proceedings. Tomorrow you have an injunction saying that the DOA should give you your warrant because we the legislature did not have the authority to enact the law that calls for the freezing of the funds? Is that a correct assessment?

Mr. Donelon said no, I do not challenge the constitutionality, I do not think, am I challenging it? Yes, as an extension of the separation of powers issue, that is correct. I say the request that that mechanism attempts to enforce is a separation of powers violation, unconstitutional. Representative Richmond said so the penalty is... Mr. Donelon said the penalty is unconstitutional because the reason that it is being imposed is unconstitutional.

Representative Richmond said so tomorrow you argue with the judge between you and the DOA, we are not in that, but I have heard you say that you want to quickly get it resolved and if the first court says turn it over, you would turn it over and you would not appeal. Well it seems to me that you are looking for some sort of cover to give it up. But for the nine lawyers on the committee you do have cover, I mean there is a lawsuit, there is pending litigation, if you and Mr. Theriot wanted to tonight you can get the lawyers to draft a settlement tonight. And the stick that you have that you are avoiding is further litigation, further cost to the taxpayer, the threat of losing your funding, so we could resolve this with two lawyers getting in a room and instead of entering into the cooperative agreement, they could enter into a settlement agreement and present that to the court. So there is a way to get out of this.

Mr. Donelon said I disagree. If I and the auditor entered into an unconstitutional settlement and sent it to the court to resolve this issue to give me "cover" which I am looking for, no doubt about it, that is why I say I will settle with the first court decision that comes down saying for me to give them what you are objecting to. That will be sufficient cover for me. But if I enter into an unconstitutional settlement of this thing, it's like I never objected to begin with. If the courts approve a settlement that is a different thing, but the courts may or may not take a serious look at an unconstitutional settlement, that they know to be unconstitutional. Most courts, I agree -clears my docket, thank you very much, next case. But this one, I do not think that is how it would be handled. So I do not think it is that simple.

Representative Richmond said it is hard for me, and we are in a difficult spot because what we do on this committee is back the Legislative Auditor and give him the authority to go in and find things where he needs to find them. Mr. Donelon interjected absolutely. Representative Richmond said over the last couple of years we have had some tremendous successes back to the Orleans Parish School Board, back to Louisiana Citizens, there are a number of successes and at the point where it appears that to me what this does is not to back his authority to go in and to get the documents that he needs and to grant an extension just to avert litigation or an adverse ruling when the parties are not necessarily cooperating. Remember we would not be here today if the consent agreement was still in effect, or if we would have never signed the consent agreement and let it work its way through the court process, but in the attempt to resolve it with the consent agreement we are where we are today and we could find ourselves here again I believe if we just continue to grant extensions. This document was entered into I guess sometime early 2008 so we have lost a year and I guess I am just trying to not lose another year, so you know that is my thought and I really thought a settlement subject to court approval is a viable way out of this, you have a date with the court tomorrow. I just do not know how prolonging this benefits people because at least in my experience in practicing law that the longer you wait to get evidence is the more you lose valuable evidence and it's been a year and who knows how long it could drag out.

Mr. Donelon said truthfully, it is like Mr. Speer just said, there is no evidence to be gathered in this case, it is all about a conflict of law that the court ultimately has to resolve. We cannot agree to compromise a constitutional issue. I cannot agree to that.

Representative Ellington said we are close to making a vote, just to say one thing and to reiterate what I had said earlier about the fact that if we grant the extension, as I appreciate it, in the spirit of understanding that it will have to go to court, but the Legislative Auditor and our attorney and the Commissioner's attorneys will be working together to try to get that date. Otherwise, there is no extension granted, he goes to court tomorrow, he gets a ruling whichever way, and again, it does not necessarily have to be your way, but he gets a ruling tomorrow and then we are back to the way I appreciate it - two adversarial sides that have no commitment to this committee or to this state to be working together and the length of time is going to be longer than it is to going to be if our attorneys and his attorneys are working together to get this resolved and it is not going to be resolved until it goes to court, that is just the plain simple fact. That's my statement and I will come back one more time - Mr. Theriot, do you recommend the extension?

Mr. Theriot said ordinarily, I think in the context of Senator Murray, I may not, but this issue has to deal with more than just an entity and it's funding and compliance with the law. I think Senator Murray you are right in as much as that this issue is greater than that because it effects my abilities to deal with the CAFR of the state which in turn effects not only all state agencies and the state's ability potentially at some point to have an additional cost in borrowing money, but every local governing body in this state at some point in time could have a negative impact, so with that in mind and in order for us to get past... Look the Commissioner and I for a year and a half have been argumentatively about different issues that we have come across, it's not going to get resolved without going to court. If the 90 days will grant that ability, knowing this and think as a caveat we need to get back here sometime in February to look at other issues we have on the agenda to deal with extensions. If in fact no progress is made towards settling a court date this body then could entertain the possibility of cutting that off short if we feel that there is no movement. I would be happy to come back and give a report and I am sure the Commissioner would be happy to come back to give a report on the status of where the issue is. With that in mind I would recommend that we do the 90 day extension.

Commissioner Donelon said I have appreciated greatly, whether you all believe it or not, this evening and the hours that we have spent exhaustively going into all of these issues. I hope that I have conveyed Mr. Chairman, Representative Kleckley, more than a stubborn ideal log adherence to some point of particular appeal to me. The bottom line truly is Representative Kleckley and members, two lawyers who I cannot ignore have told me I do not have a choice where I am. That is why I am here, I do not want to be here and your acceptance and your tolerance of four hours or whatever it is of this, I take as a compliment. I know each and every one of you, I know him, we have been long time, close friends and none of this is personal, I took exception to the comparison to Bernie Madoff, but that was not a purposeful, intentional effort to take a shot at me, I know that. Mr. Speer, Ms. Quaid, I do not know Mr. Koepp that well, but Mr. Usry, Mr. Napper, all of us involved in this have been together on issues on opposite sides, on the same side for decades and I want to make this last point. If I had something to hide here, and I know my relationship with all of you convinces you that I do not, that this is about what I am telling you it is about. I think he knows that as well, the Legislative Auditor. But if I had something to hide in these emails, all I got to do, is the same thing I am doing right now, and take it to court in an effort to forestall this discovery by you of what is there that I am trying to hide. There is nothing there that I am aware of in the 14 million emails, there is really nothing there that I have any inkling of. And I do not think there is anything there, I

didn't think that necessarily two years ago whenever this all started when the secretary came in with the box of evidence of thievery but now it is about the issue, the constitutional issue that is teed up and ready to be resolved in the next 90 days for all of state government. And I would ask you to give us the opportunity to do that and Mr. Richmond if we can find a compromise I will happily do it, I just don't think it is possible, but I want to stop by saying thank you very much for the day of your life to deal with this.

Senator Smith said I just wanted to take a minute before we vote. I have served with both gentlemen and they are gentlemen, and they are both very efficient in their own field and profession and I think both of you are very ethically and morally correct in what you believe and what you say here today. And I heard Commissioner Donelon say he did not want anything taken personally and I certainly did not and I hope that you won't take my vote personally, but I cannot see any progress that can't be resolved beginning tomorrow. Not by us granting another 90 days, I think we can advance this issue just as quickly by moving tomorrow. Whether it's 30 days or 90 days I think we can get together and resolve it. You know it brings to mind the fellow that said, and of course every attorney in here has accepted, but it brings to mind the guy who said you could lay all the attorneys end to end and they would all point in a different direction, so I think the quicker we get to the court because he is the only attorney that matters, the quicker we get there the better off we are going to be. I think that begins tomorrow.

Representative Ellington said the board is clear and we have a motion from Representative Kleckley to grant a 90 day extension to the Insurance Department. Since I think there is an objection, I would ask the secretary to call the roll.

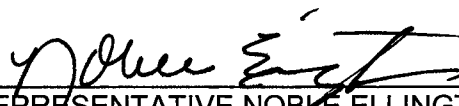
Representative Ellington -	Yes
Representative Kleckley -	Yes
Representative Ligi -	Yes
Representative Richmond	No
Senator Gautreaux -	Absent
Senator Murray -	No
Senator Nevers -	No
Senator Smith -	No

The motion has failed with four no's and three yes'.

ADJOURNMENT

There being no further business, a motion was made by Senator Murray that the meeting adjourn at 7:10 p.m. The motion passed with no objection.

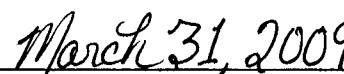
.....
APPROVED BY:



REPRESENTATIVE NOBLE ELLINGTON
CHAIRMAN



STEVE J. THERIOT
SECRETARY



DATE